(1)

No. 88-7351-CSY
Status: GRANTED
CAPITAL CASE

Title: Jeffrey Alan Walton, Petitioner
v.
Arizona

Docketed:
May 19, 1989

Court: Supreme Court of Arizona

Counsel for petitioner: Young,Denise, Ford,Timothy K.

Counsel for respondent: McMurdie,Paul J.

Entry	Date	Note		Proceedings and Orders
1	May 19 1989	G		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 16 1989			Brief of respondent Arizona in opposition filed.
4	Jun 16 1989			Memorandum of respondent Arizona filed.
5	Jun 22 1989			DISTRIBUTED. September 25, 1989
7	Oct 2 1989			Petition GRANTED.
				**********
8	Nov 7 1989			Record filed.
			*	1 vol.-AZ Supreme Court
9	Nov 16 1989	G		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
10	Nov 17 1989			Joint appendix filed.
11	Nov 17 1989			Brief of petitioner Jeffrey Alan Walton filed.
13	Nov 25 1989	D		Motion of petitioner for additional time for oral argument filed.
12	Nov 27 1989			SET FOR ARGUMENT WEDNESDAY, JANUARY 17, 1990. (4TH CASE)
14	Dec 4 1989			Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
15	Dec 11 1989			Motion of petitioner for additional time for oral argument DENIED.
17	Dec 19 1989	X		Brief amici curiae of Pennsylvania, et al. filed.
16	Dec 20 1989			CIRCULATED.
18	Dec 21 1989	X		Brief of respondent Arizona filed.
19	Jan 10 1990	X		Reply brief of petitioner Jeffrey Alan Walton (TBP) filed.
20	Jan 17 1990			ARGUED.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

88-7351

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY ALAN WALTON

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law?

2. Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?

3) Whether Arizona's "especially heinous, cruel or depraved" aggravating circumstance, as interpreted and applied by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment?

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY ALAN WALTON

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Jeffrey Alan Walton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered on February 2, 1989.

OPINION BELOW

The opinion of the Arizona Supreme Court is not yet officially reported but is attached as Appendix "A" to this petition.

JURISDICTION

The judgment of the Supreme Court of Arizona affirming Petitioner's conviction and sentence was entered on February 2, 1989. A timely motion for reconsideration was filed and is attached as Appendix "B" to this petition. The Order of the Arizona Supreme Court denying Petitioner's motion for reconsideration was entered on March 21, 1989 and is attached

reconsideration was entered on March 21, 1989 and is attached as Appendix "C" to this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> U.S. Const. amend. VI: In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . .
>
> U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. Const. amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .
>
> A.R.S. Section 13-703:
>
> Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances
>
> A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.
>
> B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the

existence or non-existence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such materials as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or non-existence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or non-existence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection

G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peach officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provision of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

STATEMENT OF THE CASE

On December 16, 1986, Petitioner was found guilty of first degree murder, armed robbery, kidnapping and theft by control. At trial, the state presented evidence that on March

2, 1986, Petitioner, Robert Hoover and Hoover's girlfriend, Sharold Ramsey, robbed the victim in a bar parking lot and then drove the victim in the victim's car to a secluded area. According to a statement given by Ramsey[1], Petitioner killed the victim. Petitioner denied any part in the killing; he stated that Hoover killed the victim. There was no physical evidence to show who killed the victim.

The jury was instructed on premeditated and felony murder - both of which constitute first degree murder under Arizona law. See Appendix "D". The guilty verdict returned by the jury did not specify whether the jury found Petitioner guilty of premeditated or felony murder. See Appendix "E".

At the penalty trial, the state argued that the evidence supported two statutory aggravating circumstances: that Petitioner committed the murder for pecuniary gain and that he committed the murder in an especially heinous, cruel or depraved manner.

At the outset of the penalty trial, Petitioner proffered testimony from the foreman of the jury that convicted him. The jury foreman would have testified that the jury could not decide whether Petitioner killed the victim and for that reason, the jury convicted Petitioner based on the felony murder rule alone[2]. The trial court refused to admit that testimony. See Appendix "F".

Petitioner presented mitigation evidence through expert

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[1]In exchange for testifying against Walton, Ramsey pleaded guilty to second degree murder.

[2]The jury foreman's testimony is further supported by the following question the jury sent to the judge during its deliberations:

> If a person is present during the commission of felony murder, but does not "pull the trigger," is that person guilty of felony murder?

psychiatric testimony that he suffered from a physically and emotionally abused childhood, that he was mentally impaired due to chronic drug abuse, that he had a passive dependent personality and was a follower, not a leader, and that he did not have a violent nature. Petitioner further argued that his youth, age 20 at the time of the crime, was relevant mitigation.

Notwithstanding the jury foreman's proffered testimony, the trial court found that Petitioner killed the victim and did so for pecuniary gain and in an "especially heinous, cruel or depraved manner"[3]. The court found no mitigating circumstances "sufficiently substantial to call for leniency," and sentenced Petitioner to death. See Appendix "G".

HOW THE FEDERAL QUESTIONS
WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. All the issues concerning the unconstitutionality of Arizona's death penalty statute were presented to the Arizona Supreme Court in Petitioner's appellate briefs challenging his conviction and death sentence. In a written opinion, the Arizona court rejected those federal constitutional claims and affirmed the conviction and death sentence. See Appendix "A", p.20-21. Petitioner moved for reconsideration, specifically arguing that the court's decision was in conflict with the Ninth Circuit's holding in Adamson v. Ricketts, 865 F2.d 1011 (1988), which found Arizona's death penalty statute

[3]In finding the "especially heinous, cruel or depraved" aggravating circumstance, the trial court gave no explanation as to what it believed those terms meant or what facts it relied on to make this finding.

unconstitutional on the very issues Petitioner raised. See Appendix "B". The court denied the motion. See Appendix "C".

REASONS FOR GRANTING THE WRIT

This case presents extraordinary circumstances. The decision below affirming Petitioner's death sentence directly conflicts with the Ninth Circuit's decision in Adamson v. Ricketts which held Arizona's death penalty statute unconstitutional on all three issues raised here. Because of these extraordinary circumstances, this Court's review is warranted. Sup.Ct.R. 17.1(a).

I. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violates the Sixth Amendment by removing the jury from the determination of factual elements of capital murder.

Under Arizona's death penalty statute, the trial judge must make two decisions at the penalty trial: 1) a factual determination whether the elements necessary to impose death exist by competent evidence beyond a reasonable doubt and 2) a determination as to the appropriate punishment to be imposed. It is only the second decision that this court said may be made by a judge. Spaziano v. Florida, 468 U.S. 447 (1984).

The first decision, whether the factual elements which make a defendant eligible for death exist, is fundamentally different from the sentencing decision. California v. Ramos, 463 U.S. 992, 1007-08 (1983); Zant v. Stephens, 462 U.S. 872, 878-79 (1983). It is a decision that requires the finding of facts - set forth as "aggravating circumstances" in Arizona's statute - which are no different than the elements of an offense found by the jury at the guilt/innocence trial. It is a decision that requires proof beyond a reasonable doubt

by admissible evidence of the elements necessary to find a defendant guilty of capital murder. A.R.S. §13-703 (C); State v. Jordan, 614 P.2d 825, 828 (Ariz.), cert. denied, 449 U.S. 986 (1980).

It is also a decision that requires the fact-finder here to inquire into the defendant's actions and state of mind at the time of the crime: whether "the defendant committed the offense" for pecuniary gain, A.R.S. Section 13-703(F)(5), or in an "especially heinous, cruel or depraved manner," A.R.S. Section 13-703(F)(6). State v. Gretzler, 659 P.2d 1, 10 (Ariz.), cert. denied, 461 U.S. 971 (1983) (court must determine defendant's "state of mind at the time of murder as evidenced by [his] . . . actions"); State v. Madsen, 609 P.2d 1046, 1053 (Ariz.), cert. denied, 449 U.S. 873 (1980) ("To comply with the statute, the receipt of the [property] must be the cause of the murder . . ."). Yet this inquiry has always been the sole province of the jury. Morrissette v. United States, 342 U.S. 246, 274 (1952) ("Where the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury.").

Here, the trial judge made these factual findings despite testimony that the fact-finder guaranteed Petitioner under the Sixth and Fourteenth Amendments -- the jury -- could not decide whether Petitioner killed the victim. The denial of a jury trial could not have greater consequences.

The determination of aggravating circumstances is also a decision that subjects a defendant to a greater and irrevocable punishment: death. When a statute requires a factual finding that not only enhances the maximum punishment but subjects a defendant to a separate and additional punishment, the Sixth Amendment requires that the defendant

be afforded a right to a jury trial. See McMillan v. Pennsylvania, 477 U.S. 79 (1986) (finding unconstitutional a preponderance standard of proof in Pennsylvania statute which increased the minimum sentence, within a determined sentencing range, for a felony conviction involving visible use of a gun because the finding "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty"). By removing the jury from the determination of the factual elements of capital murder, Arizona has violated the principle basic to Anglo-American jurisprudence: ". . . that the jury should respond as to the facts and the court as to the law." United States v. Battiste, 2 Sumner 240, 243 (1835).[4]

In Adamson v. Ricketts, 865 F.2d 1011, 1029 (1988), the Ninth Circuit agreed that the factual determination of aggravating circumstances in Arizona's statute cannot be made by a judge:

> We hold that Arizona has impermissibly identified elements of the crime of capital murder as sentencing factors for determination by a judge, thereby removing their consideration from a jury, in violation of the Sixth Amendment.

[4] Lord Coke's Latin phrasing was the accepted rule by the Seventeenth Century: "Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores." Forsyth, History of Trial by Jury, 259 (1852); see Bushell's Case, 6 Howard State Trial 999, Vaughn's Rep. 135, 149 (1670). Translated into English, it has been called "the fundamental maxim acknowledged by the Constitution." Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv.L.Rev. 669, 679 (1918). Accord, Maxwell v. Dow, 176 U.S. 581, 609 (dissenting opinion of Mr. Justice Harlan); 4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed.1900); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 185 (1898). "The distinction between the province of the judge and that of the jury is . . . clearly defined, and observed with jealous accuracy . . . [the jury has] the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere . . ." Forsythe, History of Trial by Jury at 282.

Because the decision below conflicts with the Ninth Circuit's decision in Adamson and other lower courts are divided[5] on this issue, this Court should grant review and decide this issue.

II. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering all relevant mitigating circumstances and presuming death to be the appropriate sentence.

Under Arizona's death penalty statute, once the state presents evidence to establish aggravating circumstances beyond a reasonable doubt, the defendant has the burden to establish by a preponderance of the evidence the existence of mitigating circumstances. State v. McMurtrey, 691 P.2d 1099 (Ariz. 1984), appeal after remand, 726 P.2d 202 (1986), cert. denied 107 S. Ct. 1359 (1987). If the mitigating evidence does not meet the preponderance standard, it cannot be considered in determining the appropriateness of the death penalty. The exclusion of relevant mitigation evidence violates the Eighth and Fourteenth Amendments and enhances " . . . the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Eddings v. Oklahoma, 455 U.S. 104 (1982) ("Just as the State may not by statute preclude the sentencer from considering, any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . ."). See

[5]See Harper v. Grammer, 654 F.Supp.515 (D.Neb.1987); State v. Creech, 670P.2d 463 (Id. 1983), cert denied, 465 U.S. 1051 (1984); Fitzpatrick v. State, 638 P.2d 1002, 1012 (Mont. 1981). Contra State v. Quinn, 623 P.2d 644 (Ore.1981); State v. Creech, 670 P.2d at 467-505 (dissenting opinion); Fitzpatrick v. State, 638 P.2d at 1041 (dissenting opinion).

also Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976).

For this reason, in Adamson v. Ricketts, 865 F.2d at 1041, the Ninth Circuit held Arizona's death penalty statute unconstitutional as a matter of law:

> [T]he Arizona courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. This exclusion of relevant evidence at the weighing stage violates the principle established by Woodson, Roberts, Lockett, Eddings, and reaffirmed in Turner that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances.

The Ninth Circuit also held that Arizona's death penalty statute violates the Eighth and Fourteenth Amendments because it imposes a presumption of death by requiring the defendant to bear the burden of proving mitigating circumstances sufficiently substantial to call for leniency. If the defendant does not carry that burden, death must be imposed. As the Ninth Circuit recognized, that scheme:

> . . . precludes the individualized sentencing required by the Constitution [and] . . . removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances.

Adamson, 865 F.2d at 1042 (emphasis in original).

The Eleventh Circuit's recent decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert denied 108 S.Ct. 2005 (1988) is in accord. There, the Eleventh Circuit held unconstitutional a jury instruction that death is presumed to be the proper sentence if the aggravating circumstances were

not outweighed by the mitigating circumstances. The Eleventh Circuit found that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." 837 F.2d at 1473.

In addition, the Arizona statute is mandatory: it does not permit the sentencer to decide if the death penalty is the appropriate punishment in an individual case. Where aggravating circumstances are found and no mitigating circumstances sufficiently substantial to call for leniency are found, the trial court must impose death. State v. Zaragoza, 659 P.2d 22, 28 (Ariz.), cert. denied, 462 U.S. 1124 (1983); State v. Gretzler, 659 P.2d at 13.

Because of this last feature, this case presents the same burden of proof issue on which this Court granted review in Blystone v. Pennsylvania, No. 88-6222. But it also presents more: two other, closely related issues on which there is a direct conflict between the court below and the Court of Appeals. Because Blystone cannot resolve all aspects of this conflict, review should be granted here to settle the law.

III. The decision of the court below is irreconcilable with this Court's decision in Maynard v. Cartwright and the Ninth Circuit's decision in Adamson v. Ricketts.

Petitioner was sentenced to death after the trial court found, and the Arizona Supreme Court agreed, that Petitioner "committed the offense in an especially heinous, cruel, or depraved manner." A.R.S. Section 13-703(F)(6). This statutory aggravating is almost identical to that found unconstitutional by this Court in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Like the Oklahoma court in Maynard, the Arizona Court has read this statute in the disjunctive, permitting death sentences to be imposed if the murder can be

described in any of its vague terms. State v. Gretzler, 659 P.2d at 10; see Godfrey v. Georgia, 446 U.S. 420, 454 (White, J. dissenting).

Also, like the Oklahoma court in Maynard, the Arizona court has defined this aggravating circumstance in hopelessly vague terms:

> We have objectively defined the relevant terms: a murder is "heinous" if "hatefully or shockingly evil;" "cruel" if "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" and "depraved" if "marked by debasement, corruption, perversion or deterioration. ". . . Cruelty focuses on the sensations of the victim before death, depravity focuses on the murderer's state of mind, and heinousness focuses on society's view of the murder as compared to other murders. To use this aggravating circumstance, the trial court must find that the murder is especially heinous, cruel or depraved.

State v. Ortiz, 639 P.2d 1020, 1031 (Ariz.1981), cert. denied, 456 U.S. 984 (1982) (emphasis in original, citations omitted); see Adamson v. Ricketts, 865 F.2d at 1030-1036.

This Court apparently recognized the remarkable similarity in the two statutes when it remanded another Arizona case, Woratzeck v. Ricketts, 108 S.Ct. 2815 (1988), to the Court of Appeals in light of Maynard. The Arizona court's application of the aggravating circumstance there is the same as its application here.

In Adamson v. Ricketts, the Ninth Circuit also found no distinction between the offending aggravating circumstance in Maynard and that in Arizona's death penalty statute when it held Arizona's "heinous, cruel or depraved" aggravating circumstance unconstitutional:

> Arizona has been unable to provide clearly discernable parameters to establish what kind of conduct falls within the (F)(6) circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given

> the complete lack of any objective standards that guide the court in its decision making, and its unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Adamson, 865 F.2d at 1036-37.

> The (F)(6) circumstance had been applied in an arbitrary and capricious manner in violation of the most basic principles of death penalty jurisprudence.

Adamson, 865 F.2d at 1038.

The arbitrary and contradictory application of this aggravating circumstance is well illustrated here. The Arizona Court affirmed the trial court's finding that Petitioner committed the offense in a cruel manner because the victim "suffered great mental anguish" when his "fate was uncertain." Appendix A, p. 26. Yet the court did not find cruelty in State v. Cookus, 563 P.2d 898 (1977), where the defendant robbed the victim, took him to a remote area, beat him with a gun and rocks, shot at him six times (each time the gun misfiring), and finally after discussing the matter with his accomplice, switched guns and killed the victim. Nor did the court find cruelty in State v. Brookover, 601 P.2d 1322, 1324-25 (Ariz. 1979), where the defendant shot the victim in the back, and when the victim cried out for help, shot him again. And the court did not find it cruel in State v. Nash, 694 P.2d 222 (Ariz.), cert denied, 471 U.S. 1143 (1985), where the victim, shot during a robbery, pled for mercy before the defendant shot him twice more.

This same inconsistency and contradiction is found in the Arizona Supreme Court's finding that Petitioner committed the murder in a depraved manner because after the killing, Petitioner stated that he had "never seen a man pee in his pants before." Based on that statement alone, the Arizona

court affirmed the finding of depravity, noting:

> The statement shows an indifference to the suffering of the victim and evidences a sense of pleasure which the defendant took in the killing.
>
> Appendix A, p. 27.

The statement shows no such thing; it is a neutral statement of a fact. It is not like the statement in State v. Graham, 660 P.2d 460, 463 (Ariz. 1983), where the defendant smiled when he told others that the victim "squealed like a rabbit when he was shot, or State v. Madsden, 609 P.2d 1046 (Ariz.), cert. denied, 449 U.S. 873 (1980), where the defendant bragged how "easy" it was to kill someone for insurance money. But depravity was not found in either case.

As this case demonstrates, and the Ninth Circuit agreed, the Arizona courts' willingness to find the "heinous, cruel or depraved" aggravating circumstance on any facts presented to it violates basic Eighth Amendment principles. Adamson, 865 F.2d at 1036. Because the Arizona courts continue to refuse to follow the principles set forth in Maynard v. Cartwright, review should be granted on this issue as well.

CONCLUSION

The decision below affirming Petitioner's death sentence directly conflicts with the Ninth Circuit's decision in Adamson v. Ricketts which held Arizona's death penalty statute unconstitutional on all three issues raised here. The writ of certiorari should, therefore, be granted. Sup.Ct.R. 17.1(a)

Respectfully submitted,

Denise I. Young
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185

Attorneys for Petitioner

May 20, 1989.

APPENDICES

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, vs. JEFFREY ALAN WALTON, Appellant.	)	Supreme Court No. CR-87-0022-AP Pima County Superior Court No. CR-17537

Appeal from the Superior Court of Pima County

The Honorable Thomas Meehan, Judge

AFFIRMED

Robert K. Corbin, Attorney General — Phoenix
By: William J. Schafer III
Paul J. McMurdie
Assistants Attorney General
Attorneys for Appellee

Harold L. Higgins, Jr., Pima County Public Defender — Tucson
Attorneys for Appellant

HOLOHAN, Justice (Retired)

The defendant, Jeffrey Walton, was convicted of first degree murder, armed robbery, kidnapping, and theft by control for abducting, robbing and killing Thomas Powell. He was sentenced to death on the murder conviction and to prison terms on the noncapital felony convictions, to be served consecutively to the death sentence.

The facts developed at trial are that the defendant and his two codefendants, Robert Hoover and Sharold Ramsey, had planned to rob at gunpoint some "old man that was drunk," take his car, tie him up, and leave him in the desert area outside of Tucson while they fled from the

state in his vehicle. Instead, they encountered a young marine, Thomas Powell, in a bar parking lot. They took his wallet and keys and forced him into his car with them. They then proceeded out of the city on Speedway Boulevard to Gates Pass where they pulled off the road in a secluded spot. Having no materials suitable for tying up Powell, they forced him to lie face down on the ground while they debated his fate. Ultimately, the defendant took the gun and marched Powell into the darkness, leaving the other two in the car. The defendant instructed the codefendants to "turn up the radio." After a short walk, the defendant again forced Powell to lie prone on the ground; he shot the victim once in the head and hurried back to the vehicle.

The victim had been rendered unconscious and blind by the shot, but he eventually regained consciousness. Weakened and hampered by his blindness, he floundered in the desert. Approximately a week after the shooting, the victim died from exposure and pneumonia.

Soon after the killing, the defendant asked David Bilodeau for dynamite to destroy the victim's car, explaining that he had killed someone and needed to dispose of evidence. Mr. Bilodeau promptly related this information to police who eventually arrested the trio. The defendant gave the police a statement and led them to the murder area where they found Powell's body less than a day after he had succumbed.

We have jurisdiction pursuant to art. 6, § 5(3) of the Arizona Constitution and A.R.S. § 12-102 and § 13-4031. We affirm the conviction of guilt and sentences on all counts.

The defendant presents twenty-seven issues for our review. For the sake of brevity, we consolidate those into the following issues:

I. Rule 11: Whether the defendant should have had greater opportunity to develop evidence of incompetence despite a pre-Rule 11 screening indicating no incompetence.

II. Election of Murder Theories: Whether the state should have elected between premeditated and felony murder theories.

III. Voluntariness of Statement: Whether the defendant had voluntarily rendered his statement to the police.

IV. Voir Dire: Whether the jury had been impermissibly tainted by pretrial publicity and the judge's comment at voir dire.

V. Evidence: Whether the judge erred in evidence admissibility rulings.

VI. Jury Instructions: Whether the judge erred in instructing the jury.

VII. Death Sentence: Whether the Arizona death penalty is unconstitutional, and it was properly applied by the trial court when sentencing the defendant to death.

VIII. Prison Term Sentences: Whether the trial court erred in imposing prison terms on the noncapital offenses consecutive to the death sentence, and whether the trial court erred in considering the impact of those offenses on the victim's family to aggravate the prison sentences.

IX. Ineffective Assistance of Counsel: Whether the defendant's attorney provided ineffective assistance.

I. RULE 11

The defendant first contends that the trial court erred when it denied his request for a Rule 11 competency evaluation and continuances to develop evidence of incompetency and insanity.

A. Rule 11 Evaluation

Rule 11.1, Arizona Rules of Criminal Procedure, provides that the state shall not try anyone who is "unable to understand the proceedings against him or to assist in his own defense." If a defendant appears incompetent, any party may request a competency examination. 17 A.R.S., Rules of Crim. Proc., Rule 11.2. Pursuant to Rule 11.3, if the trial court determines that reasonable grounds exist for an examination, mental health experts are appointed to examine the defendant. Prior to making the determination whether reasonable grounds exist, the trial judge may order a preliminary evaluation of the defendant. State v. Johnson, 147 Ariz. 395, 398-99, 710 P.2d 1050, 1053 (1985).

In the present case, the court ordered a preliminary evaluation of the defendant by Dr. Hinton, a psychologist with the Pima County Court Clinic. Dr. Hinton reported that the defendant displayed no signs of incompetence nor insanity. The trial court therefore concluded that there was no reasonable grounds for a Rule 11 examination. Under similar circumstances, we have held that the report of the psychologist was "more than sufficient ... to base a conclusion that defendant could assist in the preparation of his defense," hence the trial court did not abuse its discretion when it denied the motion for a Rule 11 examination. State v. Borbon, 146 Ariz. 392, 395, 706 P.2d 718, 721.

After the denial of the motion for mental examination, the defendant made several additional requests for a Rule 11 examination. However, the only showing made by the defense was the existence of a childhood history of psychiatric referrals and some blackouts caused by substance abuse. The trial court ruled, and we agree, that these matters were not relevant to show present incompetence to stand trial. Nonetheless, the

defendant persistently argued that the trial court should treat amnesia and a history of substance abuse as evidence of incompetence. The trial court declined to accept the defense's theory. We find no abuse of discretion in the trial court's rulings.

In addition, the defendant also wanted a Rule 11 evaluation to provide him with evidence bearing on his insanity at the time of the offense. However, he never gave notice, as required by Rule 15.2(b), Ariz. R. Crim. P., that he would allege an insanity defense, nor did a subsequent mental examination conducted prior to sentencing disclose any basis for an insanity defense. The defense was not entitled to expert assistance on a defense he had no intention or basis to use. Therefore, we hold that the trial judge did not err by refusing to grant a Rule 11 examination.

B. Continuances

On several occasions, the defendant sought continuances to develop evidence of incompetence or insanity related to his history of substance abuse and speculated mental illness. The court granted the defense counsel's first motion for continuance to allow him additional time for trial preparation. The trial court also ordered a preliminary mental evaluation of the defendant. After the examination and report by Dr. Hinton, subsequent motions for continuances to develop evidence of insanity were denied.

As noted above, the defendant is not entitled to continuances to gather evidence of insanity when he has not sought an insanity defense. Moreover, because the evidence he hoped to develop during continuances (memory impairment) is immaterial to his present competency and guilt, People v. Amador, 200 Cal. App.3d 1449, 246 Cal. Rptr. 605 (1988), the

The defendant finally contends that he was not afforded effective assistance of counsel. He advances four challenges to his counsel's assistance, and we raise an additional concern. We address our concern first.

After the trial judge imposed the sentence in this case he asked counsel if he wanted to represent the defendant on appeal. Counsel replied, "I don't think that's best now, considering some of the issues." Though counsel did not specify those issues, it is reasonable to assume from counsel's comment that an ineffective assistance of counsel claim would be an issue. The trial judge nevertheless appointed him to continue representing the defendant on appeal.

We believe that the trial judge should have inquired further into the matter before ordering counsel to continue to represent his client on appeal. It is important that appellate counsel be free to advance or reject the issue of effectiveness of trial counsel. We recognize that a defendant, after conviction, is often dissatisfied with the performance of his trial counsel. However, generalized dissatisfaction, without alleging a basis for an ineffective assistance claim, does not suffice to disqualify counsel on appeal. Despite the foregoing, when defense counsel advises the trial court that ineffective assistance of counsel may be an issue on appeal, the better practice is that the trial court should appoint different counsel to represent the defendant on appeal.

Following the trial judge's orders to represent the defendant, counsel directs our attention to four instances in which he alleges he acted ineffectively: (1) he focused his arguments on the distinction between "not guilty" and "innocent" instead of attacking weaknesses in the state's case; (2) he failed to raise at the suppression hearing the

detective's promises to the defendant; (3) he failed to timely file a request for a Rule 11 examination; and (4) he stipulated to crucial facts rather than presenting witnesses at trial.

The Supreme Court set forth the standard for courts to apply in evaluating ineffective assistance of counsel claims. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Id. For that, he must specify acts and omissions of counsel that allegedly constituted ineffective assistance. State v. Santanna, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). Second, the defendant must show that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. To show that, the defendant must be able to demonstrate a "reasonable probability" that the verdict might have been affected by the error. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; State v. Schossow, 145 Ariz. 504, 508, 703 P.2d 448, 452 (1985); State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, we must evaluate counsel's performance prospectively. Id. Thus, the defendant bears a heavy burden to overcome the presumption that counsel's action "might be considered sound trial strategy" at the time. Id. (citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

We preliminarily note that defense counsel in the present matter

stretches the bounds of credibility when he claims that he should have argued that his client was innocent. Counsel had to realize from overwhelming evidence of involvement in the crime that his client was not innocent. In addition, the defendant's claim fails to overcome the presumption that his counsel made a sound tactical decision. See id. Moreover, the second and third claims are rendered moot by our holdings that the detective's statement did not constitute a promise and the defendant was not entitled to a Rule 11 evaluation. See supra, Sections III, I(A). We turn to the fourth allegation.

The defendant's fourth claim, that counsel should not have stipulated to certain facts, may evidence defects in counsel's assistance, but it fails to meet the second prong of the Strickland test, i.e., that the deficiencies prejudiced the defendant. The defendant offers no more than speculation concerning prejudice: the alleged errors "potentially [had] great impact on the ultimate outcome." To show sufficient prejudice, the defendant must point to actual bias he suffered. State v. Richmond (Richmond II), 136 Ariz. 312, 317, 666 P.2d 57, 62, cert. denied, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Mere speculation of prejudice will not suffice. Santanna, 153 Ariz. at 150, 735 P.2d at 760. Although counsel's performance was at times deficient, we find that it did not prejudice the defendant. We hold, therefore, that defense counsel's conduct did not deprive the defendant of his right to effective assistance.

In conclusion, we have examined the entire record for fundamental error as required by A.R.S. § 13-4035, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), and find none. We affirm the convictions and

sentences.

WILLIAM A. HOLOHAN, Justice (Retired)

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES DUKE CAMERON, Justice

FELDMAN, Vice Chief Justice, concurring

There is no doubt that Walton was a participant in the kidnapping and robbery that eventually led to the victim's murder. Hence, there is no doubt that Walton is guilty of (felony) first degree murder. At the outset, the only issue of consequence in this case was whether Walton's punishment should be life imprisonment or death. The death penalty could be imposed only if Walton was the actual killer or acted, at the least, with reckless indifference to human life. Tison v. Arizona, ___ U.S. ____, 107 S.Ct. 1678 (1987); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982).

Following the aggravation/mitigation hearing, the trial judge sentenced Walton to death, finding that he had fired the fatal shot. This finding is the issue on appeal. Walton denies firing the shot. In his confession to the police, he accuses Hoover of the actual killing. Hoover, of course, accuses Walton. This is the so-called "mirror image accusation" -- each of two very culpable defendants points the finger at the other, seeking some measure of leniency for himself. Hoover's girlfriend, given a very generous plea bargain, unsurprisingly supports Hoover. A witness, Bilodeau, relating one of Walton's admissions, supported Walton in his statement to the police, but more or less supported Hoover in his trial testimony. It is fair to say that given their records, their characters, and the circumstances in which each of these individuals found him or herself, not one of them is especially worthy of belief.

Nor does the physical evidence help us decide who actually shot the victim. Walton owned the murder weapon, but the police found it and the victim's car in Hoover's possession when they apprehended Hoover and his girlfriend in California sometime after the crime in question.

Evidently the jury also found the question of who actually shot the victim difficult. From the question they asked the court, let alone the statement contained in the foreman's affidavit offered at the mitigation hearing, it is obvious that the jury was unable to decide whether Walton was the actual killer. Under the facts of this case, if Walton was the killer, he was certainly guilty of premeditated murder, but it appears the jury was unable to agree on such a finding.

Thus, this case illustrates a serious problem. The majority quite correctly holds that the United States Supreme Court has instructed us that Enmund findings relate only to eighth amendment issues, may be made at any stage of the proceedings, and not necessarily by the jury. Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689 (1986). Moreover, the Court has not required us to adopt any particular procedure and has left each state free to adopt its own procedure in making the Enmund findings. Id. at ____, 106 S.Ct. at 697.

Exercising the discretion later granted us in Cabana, in State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), we held that because there is only one crime of first degree murder, and "where the jury might have found the defendant guilty of [either] first degree murder based on a felony murder theory" or premeditated murder because both theories were submitted to the jury, the trial judge must then make the Enmund findings himself. Id. at 199, 665 P.2d at 81.

In my view, developments since Enmund and McDaniel -- particularly Tison with its standard of reckless indifference -- and our experience with the McDaniel procedure require a reexamination of the McDaniel procedure. In a system that values trial by jury, it seems anomalous to allow a judge to resolve the only true factual issue in the case and, in doing so, to reach a result that may be directly contrary to the jury's finding. Apparently here, the judge's finding was evidently one that the jury considered but was unable to reach.

If we continue to follow the McDaniel procedure, we may well produce decisions that conflict with the jury trial principles espoused by the United States Supreme Court in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411 (1986), and by this court in State v. Hurley, 154 Ariz. 124, 741 P.2d 257 (1987), and State v. Powers, 154 Ariz. 291, 742 P.2d 792 (1987); see also Adamson v. Ricketts, No. 84-2069, slip op. at 24-39 (9th Cir. Dec. 22, 1988) (en banc) (finding unconstitutional Arizona's death penalty statute because, inter alia, it allows the sentencing judge to find the evidence of the elements of the crime of "capital murder").

I believe that, at the very least, we must in the future consider requiring the jury to receive a separate verdict form for the premeditated murder theory in cases that have been submitted to the jury on both felony murder and premeditated murder theo-

ries. This use of separate verdict forms would give the judge in sentencing and this court in exercising its responsibility to review death penalty cases the valuable benefit of an actual jury finding, and we would also avoid many of the questions that afflict courts in reviewing death penalty cases.

STANLEY G. FELDMAN, Vice Chief Justice

MOELLER, Justice, concurring

I agree with Vice Chief Justice Feldman's suggestion that we should adopt, for future cases, the practice of submitting separate verdict forms when, in a potential death penalty case, the case is submitted to the jury on both premeditated murder and felony murder theories. In my opinion, such a change in practice would be prudent in light of developments which have occurred since the existing practice was approved in McDaniel and would, I believe, be of great assistance to trial judges and to judges of this court who are attempting to resolve the increasingly complex issues presented by death penalty cases. To this extent, I join in his concurrence.

JAMES MOELLER, Justice

HLH:mpc
5/19/89

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
48 WEST PENNINGTON STREET, THIRD FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300
HAROLD L. HIGGINS #25700
ATTORNEY FOR DEFENDANT

IN THE SUPREME COURT OF THE STATE OF ARIZONA

THE STATE OF ARIZONA, Appellee, vs. JEFFREY ALAN WALTON, Appellant.	No. CR-87-0022-AP (Pima County Superior Court No. CR-17537) MOTION FOR RECONSIDERATION

Appellant files this motion for reconsideration of the decision filed February 2, 1989, and for the reasons set forth herein, respectfully urges this Court to reverse said decision.

I.

Adamson v. Ricketts controls this Decision and Mandates Reversal.

Adamson v. Ricketts, _____ F.2d _____ (No. 84-2069, 9th Cir., filed December 22, 1988), mandates reversal of the death penalty rendered herein. The Ninth Circuit Court of Appeals found the Arizona death penalty to be unconstitutional for several reasons: 1. the findings of aggravating circumstance ought to be made by a jury;

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Appendix "B"

PIMA COUNTY PUBLIC DEFENDER
32 N. STONE AVENUE, FOURTH FLOOR
TUCSON, ARIZONA 85701
TELEPHONE: (602) 791-3300

2. the aggravating factor of "especially heinous, cruel or depraved" is impermissibly vague; 3. the sentencing court is limited to the mitigating factors enumerated in A.R.S. 13-703; and 4. the defendant has the burden of proving mitigating circumstances, thus imposing a presumption that death is an appropriate penalty.

These factors are all present in this case. The Adamson decision mandates reversal.

II.

Decision Based on Factual Inaccuracies.

Appellant raised an issue of effectiveness of counsel. The court's analysis of this issue is based on an erroneous factual premise. Thomas Higgins, Esq., represented appellant at trial. Harold L. Higgins, Jr., appellant's current counsel, was appointed to handle the appeal and has done so at all stages. Current counsel is of no relation or association to trial counsel. This court's opinion clearly assumes, and erroneously so, that trial counsel and appellate counsel were one and the same person.

Appellant still believes that trial counsel's performance was inadequate to the extent mandating reversal. In any event, the decision should be revised to correct this inaccuracy.

. . .

#39

RESPECTFULLY SUBMITTED this _____ day of May, 1989.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

By_____
HAROLD L. HIGGINS, JR.
Attorney for Appellant

Copies of the foregoing
mailed/delivered this date to:

ATTORNEY GENERAL'S OFFICE
Assistant Paul J. McMurdie

LAW OFFICES
PIMA COUNTY PUBLIC DEFENDER
32 N. STONE AVENUE, FOURTH FLOOR
TUCSON, ARIZONA 85701
TELEPHONE (602) 792-3300

Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF COURT

1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3231

TELEPHONE (602) 542-4536

KATHLEEN S. KEMPLEY
CHIEF DEPUTY CLERK

March 22, 1989

RE: STATE OF ARIZONA vs. JEFFREY ALAN WALTON
Supreme Court No. CR-87-0022-AP
Pima County No. CR-17537

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 21, 1989, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration [Appellee State] = DENIED, with Clerk to amend the opinion to correct the same to indicate appellate counsel did not serve as trial counsel.

FURTHER ORDERED: Motion for Reconsideration [Appellant Walton] = DENIED.

Justice Corcoran, having recused himself, did not participate in the determination of this matter.

Justice Moeller was not present and did not participate in the determination of this matter.

Order Affirming the Convictions and Sentences (Mandate) enclosed.

NOEL K. DESSAINT, Clerk

TO:
Robert K. Corbin, Esq., Attorney General, 1275 W. Washington, Phoenix, AZ 85007 ATTN: Paul J. McMurdie
Harold L. Higgins, Jr., Esq., Pima County Public Defender, 32 N. Stone, 4th Floor, Tucson, AZ 85701

Appendix "C"

The crime of First Degree Murder requires proof of the following three things:

1. The defendant caused the death of another person; and

2. The defendant knew that he would cause the death of another person; and

3. The defendant acted with premeditation.

"Premeditation" means:

1. That a person either intends or knows that his conduct will result in death to another person; and

2. His intent or knowledge exists before the killing long enough to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion. But no appreciable length of time must elapse between the formation of the intent to kill and the act; they may be as instantaneous as successive thoughts of the mind.

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MAY 18 '89 15:28 ELECTRON INSTANT MAIL 6023811798 P.6

303

MAY 18 '89 15:28 ELECTRON INSTANT MAIL 6023811798 P.6

Appendix "D"

ARIZONA SUPERIOR COURT, PIMA COUNTY

STATE V JEFFREY ALAN WALTON Defendant	NO. CR-17537 VERDICT HON. THOMAS MEEHAN	FILED IN COU Dec 16 19 JAMES N. CO[illegible]RT, Cle T Clune De 3:25pm

We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty of FIRST DEGREE MURDER as alleged in Count One of the Indictment.

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Larry Ramsey Inman
Foreman

SCCR-19(05/82)

Appendix "E"

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PROCEEDINGS

JANUARY 26, 1987

SENTENCING

THE COURT: State of Arizona versus Jeffrey Walton, CR-17537. Tom Higgins for the defendant. Ken Peasley for the State.

MR. PEASLEY: Kate Dawes will also be present.

THE COURT: Now is the time set for an aggravation/mitigation hearing. Is the State ready?

MR. PEASLEY: I wanted -- your witness won't be here until 8:30?

MR. HIGGINS: Yes.

THE COURT: Let's proceed with the aggravation hearing.

MR. PEASLEY: I would call Dr. Jones.

MR. HIGGINS: I have just a preliminary argument before Dr. Jones testifies.

THE COURT: Go ahead.

MR. HIGGINS: I interviewed Dr. Jones in preparation for trial. But I believe he's going to testify to matters that are outside the aggravating circumstances under 13-703, et cetera. Those matters being the length of time that the victim was alive

Appendix "F"

subpoenaed down here who is a jury member and we had something to take up with the Court on that. But besides that, nothing else.

THE COURT: And you only have the one witness?

MR. HIGGINS: Meaning Dr. Gurland? I may have one other one. We are going to reach a stipulation on Dr. Munoz and we may have Mike Addis as a witness but I haven't talked to him completely. So probably just Dr. Gurland. That's correct.

THE COURT: All right, what's next?

MR. HIGGINS: I have Larry Inman who was the foreman of the jury outside, if you want to argue that we can do that. And I would like to call him if I can.

MR. PEASLEY: As I indicated to Mr. Higgins 24.1 and State versus Hall, which is 129 Arizona 589 and State versus Callahan, 119 Arizona 217, I think it's clear that jury affidavits or testimony are not admissible insofar as they concern the deliberating process of jury members. And Mr. Higgins apparently intends to elicit testimony from Mr. Inman concerning his deliberation process during the course of the jury deliberations in this case.

appropriate either by virtue of live testimony or affidavit.

MR. HIGGINS: Judge, I am going to ask him a couple of things. I know what the case law and rule 24 says. That goes to their mental processes as to assenting or dissenting from the verdict, I am not going into that, I'm going to ask questions in those two areas briefly, that being whether the jury utilized the felony murder or premeditated murder which were both submitted to them over my objection in their deliberations, he will tell you the felony murder.

And then I would ask him if they considered, if the jury considered premeditated murder and he will answer yes, but never could decide on who pulled the trigger.

The reason that's important is because since the Enmund case, a Supreme Court case, and MacDaniels followed it in our Supreme Court, they found if the felony murder rule was used, Your Honor, because we don't have a jury decision on this, Your Honor has to decide whether the defendant killed, attempted to kill or intended to kill and that goes to the weight of that. The jury could not reach that decision and that's the arbiter of that fact.

will not go into things that go into the verdict, under the case law they can proceed under either or both. But I am going to ask which one and why. And that's all. I'm not going into the other things. And there are other things that arguably would affect the verdict and I am not going to question about that. That way I think there's not an invasion of the juror's province and it is a factual determination.

MR. PEASLEY: I don't know how much more you can inquire into the deliberation process than to be asking upon what the jury based its verdict. He's down here pursuant to a subpoena, he had to answer the subpoena; and to put a juror on the witness stand under subpoena and start making inquiries about the deliberating process I think is entirely improper under the rules. I would oppose the request, I frankly disagree from my understanding with some of the things Mr. Higgins says but I don't want to start bantering about a jury decision because I think it's improper, I would move to preclude this testimony.

THE COURT: Show the motion to preclude the juror's testimony is granted. And Tom, I will accept that as an offer of proof for purposes of the record.

MR. HIGGINS: Okay, hat is what I was going to ask.

THE COURT: Okay. Is there anything else right now?

MR. HIGGINS: Not right now.

MR. PEASLEY: Not right now.

THE COURT: Continue this hearing until 8:30 tomorrow morning.

((Whereupon the Court stands adjourned in this matter for the day.))

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottrell Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

[ ] ORDERED exonerating any bond.

[ ] ORDERED granting the State's Motion to Dismiss _____

ORDERED authorizing the Sheriff of Pima County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

FILED: Notice of Rights of Appeal, signed by the Defendant.

[X] ISSUED: Order of Confinement

10:00 a.m./p.m. Hearing concludes.

JUDGE OF THE SUPERIOR COURT

cc: County Attorney (3)
Thomas Higgins, Esq.
Harold Higgins, Esq.
Department of Corrections - 3 certified
Arizona Supreme Court, Phoenix, AZ
Sheriff - 3 certified
Adult Probation - 1 certified
Appeals
Hon. John G. Hawkins
Hon. Thomas Meehan

[ ]

BOOK 2900 PAGE 387

Page 9

MINUTE ENTRY FREY ALAN WALTON

Page No. 8 Date Janaury 27, 1987 Case No. CR-17537

IT IS ORDERED that Thomas Higgins be withdrawn as attorney of record.

IT IS FURTHER ORDERED Harold Higgins be appointed to represent defendant on appeal.

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BOOK 2900 PAGE 386 Sharon Cottrell

Appendix "G"

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Four, THEFT BY CONTROL OVER $1,000.00

FELONY CLASS: 3

IN VIOLATION OF A.R.S. SECTIONS: 13-1802(A)(1) and (C); 13-604

DATE OF OFFENSE: 3/2/86

SENTENCE: ten (10) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED
[X] NONDANGEROUS [ ] DANGEROUS PURSUANT TO A.R.S. 13-604
[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604
[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. a Class _____ felony, nondangerous/dangerous, convicted in _____

2. a Class _____ felony, nondangerous/dangerous, convicted in _____

[X] This sentence is to be concurrent with Counts Two and Three

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.
This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Three, KIDNAPPING

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1304(A)(3) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED
[ ] NONDANGEROUS [X] DANGEROUS PURSUANT TO A.R.S. 13-604
[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604
[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. a Class _____ felony, nondangerous/dangerous, convicted in _____

2. a Class _____ felony, nondangerous/dangerous, convicted in _____

[X] This sentence is to be concurrent with Count Two

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.
This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

XVI Division | January 27, 1987 Date | THC S MEEHAN Judge or Commissioner | Sharon Cottre Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Two, ARMED ROBBERY

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1902; 13-1904(A)(1) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] MITIGATED [ ] PRESUMPTIVE [X] AGGRAVATED

[ ] NONDANGEROUS [X] DANGEROUS PURSUANT TO A.R.S. 13-604

[X] NONREPETITIVE [ ] REPETITIVE PURSUANT TO A.R.S. 13-604

[ ] NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) [ ] DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. _____

a Class _____ felony, nondangerous/dangerous, convicted in _____

2. _____

a Class _____ felony, nondangerous/dangerous, convicted in _____

[ ] This sentence is to be concurrent with _____

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record. 403

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for _____ days served prior to sentencing.

(Continued)

January 27, 1987 Case No. CR-17537

As to counts Two, Three and Four,

THE COURT FINDS the same aggravating circumstances. In addition thereto,

THE COURT FINDS the following aggravating circumstances:

Prior felony conviction; traumatic anxiety and loss caused to the victim's family; defendant's failure to benefit from prior rehabilitative efforts in his behalf.

THE COURT FINDS a significant danger to the community, therefor

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BOOK 2000 PAGE 382

MAY 19 '89 15:30 ELECTRON INSTANT MAIL 6023811798 P.13

Div January 27, 1987 Date TH AS MEEHAN Judge o. ommissioner Sharon Cox Deputy

No. CR-1753.

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count One, FIRST DEGREE MURDER

FELONY CLASS: 1

IN VIOLATION OF A.R.S. SECTIONS: 13-1105; 13-703; 13-710

DATE OF OFFENSE: 3/2/86

SENTENCE: IT IS THE SENTENCE OF THE COURT that defendant be committed the Arizona State Department of Corrections and there to be put to death in the manner prescribed by law.

( ) MITIGATED ( ) PRESUMPTIVE ( ) AGGRAVATED

( ) NONDANGEROUS (X) DANGEROUS PURSUANT TO A.R.S. 13-604

(X) NONREPETITIVE ( ) REPETITIVE PURSUANT TO A.R.S. 13-604

( ) NONDANGEROUS BUT VIOLATIVE OF A.R.S. 13-604.01(B) ( ) DANGEROUS AND VIOLATIVE OF A.R.S. 13-604.01(A)

IF REPETITIVE PER A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. _____
a Class _____ felony, nondangerous/dangerous, convicted in _____

2. _____
a Class _____ felony, nondangerous/dangerous, convicted in _____

( ) This sentence is to be concurrent with _____

( ) This sentence is to be consecutive with _____

and the reasons therefore are stated by the Court on the record.

This sentence is to date from January 27, 1987 The Defendant is to be given credit for 123 days served prior to sentencing.

(Continued) BOOK 2900 PAGE 384

XVI Div January 27, 1987 Date THOMAS MEEHAN Judge or Commissioner Sharon Cottr Deputy

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated on the following page. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

As to Count One, FIRST DEGREE MURDER.
THE COURT FINDS beyond a reasonable doubt that the defendant caused the victim's death.
The court has considered the following mitigating circumstances:
1) Competency to appreciate the wrongfulness of his conduct or to conform his conduct as to the requirements of law was impaired but not so impaired to prevent a prosecution.
2) The court also considered all other mitigating factors as set forth in the presentence report and as presented by his attorney this date.
THE COURT FINDS the following aggravating circumstances:
1) That the defendant committed the offense in an especially heinous, cruel or depraved manner.
2) That the offense was committed for pecuniary gain.
THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency, therefore,

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BOOK 2900 PAGE 380

S

January 27, 1987
JAMES N. CORBETT, Clerk
X. Cottrell Deputy

SUPERIOR COURT OF ARIZONA
PIMA COUNTY
TUCSON, AZ

[James N. Corbett]

XVI Div | January 27, 1987 Date | THOMAS MEEHAN Judge or Commissioner | Sharon Cottrell Deputy

NO. CR-17537

STATE OF ARIZONA
VS
JEFFREY ALAN WALTON

County Attorney
By: Kenneth Peasley and Kate D.

Thomas Higgins
Defense Counsel

DATE OF BIRTH: 1/29/66

SENTENCE OF IMPRISONMENT

8:30 a.m./~~p.m.~~. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

0 ✓

Court Reporter Deirdre Muzall is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant ~~knowingly, intelligently, and voluntarily waived his right~~ to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

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[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

(Continued)

DATE 10/25/87

NOV 18 '89 15:29 ELECTRON_INSTANT MAIL 6023811798

ORIGINAL

Supreme Court, U.S.
FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-7351

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JEFFREY ALAN WALTON,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

(9)

ROBERT K. CORBIN
Attorney General of
the State of Arizona

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Attorneys for RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does Arizona's death penalty statute violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death?

2. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency?

3. Has Arizona's death penalty aggravating factor of "especially heinous, cruel or depraved" been sufficiently defined to satisfy the requirements of Maynard v. Cartwright, ___ U.S. ___, 108 S. Ct. 1853 (1988)?

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OPINION BELOW

The Arizona Supreme Court held: (1) Arizona's death penalty statute does not violate the Sixth Amendment right to a jury trial by requiring the trial court to determine the existence of aggravating factors necessary for the imposition of capital sentencing; (2) Arizona's death penalty statute does not create an unconstitutional mandatory death sentence by requiring the defendant to prove the existence of mitigating evidence sufficient to call for leniency; and (3) Arizona courts have sufficiently defined the aggravating factor of "especially heinous, cruel or depraved." State v. Walton, ___ Ariz. ___, 769 P.2d 1017, 1030 (1989).

STATEMENT OF JURISDICTION

On January 27, 1987, a Pima County Superior Court judge found insufficient mitigating evidence to call for leniency given the aggravating circumstances, and sentenced Jeffrey Alan Walton to death. On February 2, 1989, the Arizona Supreme Court affirmed the conviction and sentence. State v. Walton, ___ Ariz. ___, 769 P.2d 1017 (1989). Walton filed a timely motion for reconsideration, which was denied by the Arizona Supreme Court on March 22, 1989. On May 20, 1989, Walton filed a timely petition for writ of certiorari with this Court. This Court has jurisdiction to entertain the petition pursuant to United States Constitution Article III, § 2; 28 U.S.C. § 1254(1), and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED

The pertinent portion of the Sixth Amendment to the United States Constitution provides:

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

The pertinent portion of the Eighth Amendment to the United States Constitution provides:

[N]or cruel and unusual punishments inflicted.

The pertinent portion of the Fourteenth Amendment to the United States Constitution provides:

[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

Applicable Arizona statutes involved are:

13-1105. First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, narcotics offenses under section 13-3408, subsection A, paragraph 7 or section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson of an occupied structure under section 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504 or child abuse under section 13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by section 13-703.

13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in section 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at

the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or

persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

STATEMENT OF FACTS

On March 2, 1986, Thomas Powell, a young Marine on leave, borrowed his mother's car for the evening. On that same day, petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk, tie him up, and leave him in the desert. Ramsey and Hoover agreed to the idea, and left their trailer with petitioner. The three traveled to a swap meet in Tucson and proceeded to fulfill their objectives. Eventually, the trio arrived at a bar and began to wait for their old, drunk victim.

Thomas Powell left the bar and headed towards his mother's car. Hoover whistled to let petitioner know that someone was coming. Powell proceeded around a van where he was confronted by petitioner, who cocked his gun and ordered Powell to empty his pockets and place the contents on top of his car. Powell complied with petitioner's demands and then laid down on the ground. Powell was then ordered off the ground and petitioner gave Powell's car keys to Hoover to drive.

Petitioner put Powell in the back seat and Hoover drove Powell's vehicle. The four proceeded out of Tucson to a desert location known as Gates Pass. While driving to the desert, petitioner and Hoover engaged in conversation with

Powell, asking him where he lived and if he had any more money. Powell indicated that he lived in the area, but that he did not have any more money, as he had given his mother money for his sister's rent.

Upon their arrival at Gates Pass, petitioner and Hoover got out of the car and began arguing about what to do with Powell. Eventually, Hoover stated he did not care what petitioner did with Powell. Whereupon, petitioner told Hoover and Ramsey to turn up the car radio. Petitioner then took Powell out in the desert and shot him in the head. Powell died several days later.

Petitioner returned to the stolen vehicle and informed his accomplices that it was loud, "it sounded like a rifle." The three then proceeded to a "Carl's Jr.," and bought hamburgers with the money taken from Powell. At the trailer, petitioner stated to Ramsey and Hoover that he should have checked Powell for a pulse, but petitioner was sure the victim was dead because he shot him in the head. Petitioner boasted that he never saw a "man pee his pants before." After finishing his burger, petitioner wiped the fingerprints off the car and parked the car in a bowling alley parking lot.

On Wednesday, March 5, 1986, Hoover and Ramsey left Tucson in Powell's car and went to California. Prior to leaving, petitioner, Hoover, and Ramsey went to David Bilodeau's house to find some dynamite to destroy the car. Petitioner told Bilodeau that he had shot someone and he needed some dynamite to get rid of the car. Petitioner informed Bilodeau that the man he shot was someone from the armed services and that he had shot him in the head. Petitioner stated that the shooting took place at Gates Pass and showed Bilodeau the gun. Bilodeau told petitioner

that he did not have any dynamite, and petitioner left. Bilodeau then telephoned the police and informed them what had happened.

On December 16, 1986, the jurors found petitioner guilty of first-degree murder. On January 26 and 27, 1987, the trial court conducted an aggravation/mitigation hearing. At the conclusion of the evidence, the trial court stated that he found beyond "any doubt" that petitioner had fired the shot that resulted in the death of Thomas Powell. The trial court, after considering the mitigating circumstances, found two aggravating circumstances -- that the crime was committed in an extremely heinous, cruel or depraved manner, and for pecuniary gain. The trial court determined that the mitigating circumstances did not call for leniency and, therefore, ordered that petitioner be committed to the Department of Corrections to be put to death.

REASONS FOR GRANTING THE WRIT

In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), pet. for cert. pending, Ricketts v. Adamson, No. 88-1553 (U.S., filed Mar. 20, 1989), the Ninth Circuit Court of Appeals held the Arizona death penalty unconstitutional for the reasons argued in the instant petition. In State v. Vickers, ___ Ariz. ___, ___ n.2, 768 P.2d 1177, 1188 n.2 (1989), the Arizona Supreme Court respectfully refused to follow the Ninth Circuit's opinion. Until this conflict is resolved in its entirety by this Court, the status of the law is in hopeless deadlock. Therefore, respondent agrees with petitioner that this Court should grant the instant petition for writ of certiorari, but contends that the Arizona Supreme Court's holding should be affirmed for the following reasons.

I. Arizona's death penalty statute does not violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death.

This Court has said that there is no one right way for a state to set up its capital sentencing scheme. Spaziano v. Florida, 468 U.S. 447, 464 (1984). In Adamson v. Ricketts, the Ninth Circuit disagreed finding that because aggravating circumstances determine eligibility for the death penalty, they are elements of a higher offense, "capital murder," and must be determined by a jury at the guilt phase. 865 F.2d at 1017-29. The Ninth Circuit's opinion on this issue is contrary to this Court's holding in Hildwin v. Florida, No. 88-6066 (U.S., May 30, 1989). In Hildwin, the defendant argued that the Florida death penalty statute was in violation of the Sixth Amendment right to a jury trial because it permitted the imposition of death without the jurors' finding the existence of aggravating circumstances. This Court rejected the defendant's conclusion stating:

> [T]he requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."

Id., slip op. at __ (citation omitted).

The Florida and Arizona death penalty statutes are similar in that both require the trial judge, not the jury, to find the existence of aggravating factors. As Adamson v. Ricketts, and the arguments made by petitioner, cannot be reconciled with this Court's opinion in Hildwin, the petition for certiorari should be granted and the Arizona Supreme Court's decision affirmed on this issue.

. . . .

. . . .

II. The Arizona death penalty statute does not violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency.

By statute, the defendant in Arizona has the burden of producing mitigating evidence. Ariz. Rev. Stat. Ann. § 13-703(C). Arizona requires that the defendant prove by a preponderance of affirmative evidence the existence of what he asserts. State v. Leslie, 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985); State v. Harding, 137 Ariz. 278, 292, 670 P.2d 383, 397 (1983), cert. denied, 465 U.S. 1013 (1984); State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, cert. denied, 454 U.S. 882 (1981). The statute in no way limits the presentation of potential mitigation, but it does require that after the state has proven aggravation, the defendant produce substantial mitigation to avoid the death penalty. Ariz. Rev. Stat. Ann. §§ 13-703(E) and (G). In Adamson v. Ricketts, the Ninth Circuit conceded that Arizona may require the defendant to produce mitigation, but objected to the preponderance standard. 865 F.2d at 1039-44. The Ninth Circuit has, however, upheld a Montana statute that required the defendant to prove the substantiality of mitigation. Coleman v. Risley, 839 F.2d 434, 445-48 (9th Cir. 1988).

This Court has sustained statutes requiring the defendant to prove, at the guilt phase, affirmative defenses such as insanity, self-defense, and extreme emotional disturbance by a preponderance of the evidence and, in one case, beyond a reasonable doubt. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Rivera v. Delaware, 429 U.S. 877 (1976); Leland v. Oregon, 343 U.S. 790 (1952). In view of these cases, a

statute that requires a convicted defendant to prove an "affirmative defense" of mitigation by establishing the truth of what he asserts by a preponderance of the evidence does not violate the Constitution. Respondent agrees that any fact constituting relevant mitigation must be weighed; but this Court has never said that the sentencer must accept bare assertions as fact. For instance, if a defendant states that for 20 years he has supported his invalid mother, but he can offer no proof of his assertion, a sentencer should not be required to accept the bare assertion as a fact, and give to it mitigating weight. Even where the defendant proves his allegations, the sentencer does not have to agree that they constitute mitigation. Raulerson v. Wainwright, 732 F.2d 803, 807 (11th Cir. 1984).

The Ninth Circuit also found the Arizona statute flawed because it imposed a "presumption of death" when it required the defendant to produce substantial mitigation to warrant leniency. Id.[1] The court relied on the cases of Sumner v. Shuman, 483 U.S. 1002 (1987), Roberts v. Louisiana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976). The statutes struck down in those cases, however, required death upon conviction of a specified offense. Contrary to the Arizona statute, those statutes did not permit consideration of mitigation. Clearly, there is not a "presumption of death" under the Arizona statute, as upon conviction the prosecution must

---

1. This Court presently has before it similar contentions in Blystone v. Pennsylvania, No. 88-6222, cert. granted, 57 U.S.L.W. 3635, and Boyde v. California, No. 88-6613, cert. granted, ___ U.S.L.W. ___ (June 5, 1989).

prove at least one aggravating circumstance beyond a reasonable doubt, or death may not be imposed. Ariz.Rev.Stat.Ann. § 13-703. Likewise, if the state is successful in proving an aggravating factor, a defendant may show mitigation and thereby obtain a life sentence.

Respondent believes that the Ninth Circuit's conclusion that a defendant cannot be required to produce substantial mitigation is a misunderstanding of what this Court meant by "discretion" in previous cases. This Court struck down the death penalty in Furman v. Georgia, 408 U.S. 238 (1972), because there were no guidelines to channel the sentencer's discretion and death was so infrequently imposed that it appeared capricious. Gregg and Proffitt said that aggravating factors could be used to channel the sentencer's discretion. The purpose of proving aggravation is to persuade the sentencer that death is the appropriate penalty. If the state has proved aggravation, and the defendant produces no mitigation or insufficient mitigation to counter the aggravation proved by the state, the Constitution should not demand that the sentencer have unbridled discretion to impose life. Such unbridled discretion would be just as capricious as the practice condemned in Furman, because it allows one who deserves death to escape it for reasons unrelated to relevant mitigation. By requiring the imposition of death if aggravation is proved and there is no substantial mitigation, the Arizona statute avoids the capriciousness condemned in Furman by assuring that those who deserve death will not escape it for improper reasons, such as the sentencer's philosophical opposition to the penalty. State v. Beaty, 158 Ariz. 232, 246-47, 762 P.2d 519, 533-34 (1988).

In California v. Brown, 479 U.S. 538 (1987), this Court held that it was proper to instruct jurors not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in deciding the sentence. The Court noted that neither Brown nor the California Supreme Court contended that such factors, unrelated to relevant mitigation, should play any role in the sentencing determination. Id. at 542. If the Constitution permits the instruction given in Brown, then the Constitution does not require that the sentencer be allowed to impose life capriciously when the defendant cannot produce relevant or substantial mitigation.

Franklin v. Lynaugh, ___U.S.___, 108 S. Ct. 2320 (1988), reexamined the statute upheld in Jurek v. Texas. The Court noted that Lockett did not say that the state has no role in structuring the sentencer's consideration of mitigation. ___ U.S. at ____, 108 S. Ct. at 2330. In Texas, if the jury answers two -- sometimes three -- questions affirmatively, the statute requires the death penalty. Franklin argued that even if the jurors had answered the special questions affirmatively, they were still entitled to cast an "independent" vote against the death penalty. This Court said that the defendant's argument had been foreclosed by Jurek. Id. The Texas statute does not give the sentencer discretion to impose life in spite of affirmative answers to the aggravating questions. If the Texas procedure is constitutional, so is Arizona's.[2]

---

2. Concurring in the judgment, Justice O'Connor noted that the sentence should reflect a reasoned moral response to the defendant's background, character and crime:

> Nothing in Lockett or Eddings requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense. Lockett, supra 438 U.S. at 604, n. 12, 98 S.Ct., at 2965, n. 12 . . . .

108 S.Ct. at 2333.

III. The aggravating factor of "especially heinous, cruel or depraved" has been sufficiently defined to satisfy the requirements of Maynard v. Cartwright.

In Adamson v. Ricketts, the Ninth Circuit found Arizona's aggravating circumstance of especially heinous, cruel or depraved unconstitutional on its face. Id. at 1031-39. In Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1987), the same court considered an identical challenge and rejected it. Another panel, in Woratzeck v. Ricketts, 820 F.2d 1450, 1459 (1987) [remanded for reconsideration in light of Maynard v. Cartwright, ____U.S.____, 108 S. Ct. 1853 (1988)], concluded that the presumption of correctness under 28 U.S.C. § 2254(d) should be accorded the state court's findings of fact when considering a challenge to aggravating circumstances.

This Court said in Barclay v. Florida, 463 U.S. 939, 947 (1983), that federal review of such circumstances is limited to whether they are so "unprincipled or arbitrary as to somehow violate the United States Constitution." In Maynard v. Cartwright, this Court found an Oklahoma statute unconstitutional because: (1) there were no instructions to the jurors about what the terms meant; and (2) the Oklahoma Criminal Court of Appeals appeared merely to survey the facts to see whether the circumstance existed, without saying what factors must be present to sustain it. In contrast to the Oklahoma procedure, the Arizona Supreme Court has defined the terms, and has specifically said what facts must be present to establish them. Furthermore, in Arizona the trial court imposes the sentence.

1. Evolution of the Circumstance

Instead of attempting a comprehensive description of factual situations that would fall within the parameters of

this circumstance, the Arizona Legislature deferred to the Arizona Supreme Court. This Court has recognized that judicial construction of a statute may render it constitutional. Gregg v. Georgia; Proffitt v. Florida. The definitions of the terms -- especially heinous, cruel, or depraved -- may be conceived as three circles. The legislature chose to let the Arizona Supreme Court fill in those circles. Naturally, this is an evolutionary process. Therefore, given the limitations of language, a court necessarily begins with dictionary definitions and fleshes out the various factual situations as they present themselves. That is precisely what the Arizona Supreme Court did:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict plain esp. in a wanton, insinsate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). In Knapp, the Arizona Supreme Court stated that the legislature intended to include killings where additional circumstances "set the crime apart from the usual or the norm." Id. Recognizing that every murder in a certain sense may be characterized as heinous, cruel, or depraved, that court has required that the facts show it to be especially heinous, cruel, or depraved. State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979).

2. Especially Cruel

By the time the Arizona Supreme Court handed down State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert. denied, 461 U.S. 971 (1983), it had reviewed a sufficient number of

cases to crystalize the requirements to establish each prong of the circumstance. The court explained that "especially cruel" would be satisfied only when the prosecution proved beyond a reasonable doubt that the victim had consciously suffered mental anguish or physical pain prior to death. Id. at 51, 659 P.2d at 12. Those requirements have been consistently applied. State v. Vickers, ___ Ariz. ___, 768 P.2d 1177 (1989) (cruelty established where the defendant threw flaming liquid upon the conscious victim, who vainly ran around his cell trying to extinguish the flames until he died); State v. Fulminante, 11 Ariz. Adv. Rep. 7, 19-21 (June 16, 1988) (mental anguish established where the defendant beat and tortured an 11-year-old girl and made her beg for mercy before shooting her); State v. Beaty, 158 Ariz. 232, 237, 242, 762 P.2d 519, 524, 529 (1988) (mental anguish established where the terrified victim vomited while the defendant held his hand over her mouth prior to raping and murdering her); State v. (Walter) LaGrand, 153 Ariz. 21, 36-37, 734 P.2d 563, 578-79 (1987) (mental anguish and physical pain demonstrated where the defendant bound, gagged, and threatened the bank manager with death, then inflicted 24 stab wounds with a letter opener); State v. Castaneda, 150 Ariz. 382, 393, 724 P.2d 1, 12 (1986) (mental anguish and physical pain established by proof that the defendant repeatedly sodomized a 12-year-old boy, drove him to the desert, forced him to remove his clothes, then stabbed him four times in the chest as he pled for his life, leaving him writhing in pain on a red ant hill).

Only a few months after Gretzler, the Arizona Supreme Court decided State v. Adamson. In Adamson, it introduced a new requirement that narrowed the application of the

circumstance: The defendant must either intend to inflict mental anguish or physical pain, or reasonably foresee that he will inflict it. 136 Ariz. 250, 266, 665 P.2d 972, 988, cert. denied, 464 U.S. 865 (1983). As the dissent recognized in Adamson v Ricketts, there has been no post-Adamson case where this circumstance has been sustained without evidence that the defendant either intended to inflict anguish or physical pain, or reasonably foresaw that he would do so.

3. Especially Heinous or Depraved

Contrasted to cruelty, these elements focus upon the defendant's attitude and mental state, as reflected in his words or actions, at or near the time of the murder. State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980). Gretzler listed the factors: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; (5) helplessness of the victim. Neither of the last two elements, in isolation, would necessarily lead to the application of the circumstance. 135 Ariz. at 51-53, 659 P.2d at 10-12. The Arizona Supreme Court has consistently applied these factors. State v. LaGrand (infliction of gratuitous violence and needless mutilation, plus the senselessness of the killing and the helplessness of the victim); State v. Wallace, 151 Ariz. 362, 366-68, 728 P.2d 232, 236-38 (1986) (infliction of gratuitous violence after the victims had collapsed, decision to use a baseball bat and pipe wrench in spite of possession of a loaded revolver, and the total senselessness of killing three people with whom he had lived 2 years as a family); State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985) (defendant used special bullets designed to make

bigger holes, subsequently bragged about the murder, and gave a friend three spent bullets as souvenirs).

4. As Applied to Petitioner

Petitioner does not dispute that the Arizona Supreme Court applied the above-cited standard to him, but claims that in other cases, arguably similar, the state supreme court did not find the aggravating circumstance. The reasons for the Arizona Supreme Court's factual determinations in other cases are not of constitutional scope and are beyond this Court's ability to review. Petitioner is only entitled to a standard that is not vague. The fact that other fact-finders may not reach the same conclusion on similar facts is irrelevant.

CONCLUSION

Respondent prays that for the reasons stated herein that the petition for writ of certiorari will be granted, and that the Arizona Supreme Court's decision affirmed on the issues presented.

Respectfully submitted,

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL J. McMURDIE, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding three (3) copies of BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DENISE I. YOUNG
Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
Attorney for PETITIONER

this 16th day of June, 1989.

Paul J. McMurdie

PAUL J. McMURDIE

SUBSCRIBED AND SWORN to before me this 16th day of June, 1989.

Janet E. Dyer

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

9873d jd

No. 88-7351

Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JEFFREY ALAN WALTON,

Petitioner,

vs.

ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 19, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

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CHRONOLOGICAL LIST OF RELEVANT EVENTS

March 21, 1986 – Petitioner indicted for first degree murder and related felonies

December 11, 1986 – Petitioner's jury trial commences

December 16, 1986 – Jury commences deliberations

December 16, 1986 – Jury sends note to trial judge asking "If a person is present during the commission of Felony Murder, but does not 'pull the trigger' is that person guilty of Felony Murder?' "

December 16, 1986 – Jury returns verdict of guilty of first degree murder

January 26, 1987 – Sentencing hearing commences before trial judge

January 27, 1987 – Sentencing hearing concludes; trial judge sentences Petitioner to death

January 27, 1987 – Petitioner's Notice of Appeal filed

February 2, 1989 – Opinion and judgment of Arizona Supreme Court affirming petitioner's conviction and sentence

February 17, 1989 – Petitioner's Motion for Reconsideration filed

March 21, 1989 – Order of Arizona Supreme Court denying Petitioner's motion for reconsideration

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986

72-GJ-236

STATE OF ARIZONA, Plaintiff vs. JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER Defendant(s)	INDICTMENT CAUSE NO CR17537

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT ONE (FIRST DEGREE MURDER, A CLASS ONE FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER murdered THOMAS DALE POWELL, in violation of A.R.S. §§ 13-1105, 13-703, and 13-710.

COUNT TWO (ARMED ROBBERY, A CLASS TWO FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER robbed THOMAS DALE POWELL while armed with a deadly weapon, or a simulated deadly weapon, to wit: a gun, in violation of A.R.S. §§ 13-1902, 13-1904 (A)(1) and (B), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 G, 13-604 B and D, and 13-604 M.

TPD 8603045002

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
By /s/ Kate Dawes
Dated 3-21-86

True Bill
/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986
(Caption omitted in printing)

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT THREE (KIDNAPPING, A CLASS TWO FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

kidnapped THOMAS DALE POWELL, a Class Two Felony, with the intent to inflict death, physical injury on him and/or aid in the commission of a felony, in violation of A.R.S. §§ 13-1304 (A)(3) and (B), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 G, 13-604 B and D, and 13-604 M.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/ Kate Dawes
Dated 3-21-86

True Bill

/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986
(Caption omitted in printing)

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT FOUR (THEFT BY CONTROL, A CLASS THREE FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER committed theft by knowingly controlling property with a value of $1,000 or more, as follows: a 1985 Ford Escort, 4-door hatchback, light blue in color, bearing Arizona license plate number CSX958, which is a motor vehicle, belonging to LINDA DEAN POWELL, in violation of

A.R.S. §§ 13-1802 (A)(1) and (C), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 B and D, and 13-604 M.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/ Kate Dawes
Dated 3-21-86

True Bill

/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

[31] [Caption omitted]

[Prosecutor's Opening Statement]
Tucson, Arizona
December 12, 1986

* * *

There are four charges as the judge has told you, one is first degree murder, at the close of the case the judge will tell you what the law is. So you have some idea when you listen to the witnesses about what the charges entail, let me tell you the State has the burden of proof beyond a reasonable doubt as to each of the elements of first degree murder. When you listen to the evidence the State has to prove to you beyond a reasonable doubt that it happened one of two ways. The legislature says you can do first degree murder one of two ways.

The one most are familiar with, that is premeditation, you think about it and you kill somebody. And that premeditation, when you listen to the evidence about that, there is no time period required as long as there's time for the defendant to reflect upon what he does, the time it takes to walk somebody from the car to a desert area, put them on the ground and shoot them, that's premeditation. You folks will find from the facts whether he intentionally killed somebody with premeditation.

The second way of first degree murder is what [32] is called felony murder. Felony murder means that, the legislature provides that there are certain felonies that are dangerous enough, the inherent dangerousness involved in the commission of these felonies provides that if you

are involved in committing or attempting to commit certain felonies and if during the commission or attempted commission of one of those enumerated felonies a death results, you are guilty of first degree murder. Whether he intended it or not. Whether he intended it or not.

Armed robbery and kidnapping are two of those felonies. So if you are involved, and listen to the testimony, the defendant is involved in the commission or attempted commission of an armed robbery or a kidnapping and a death results, the death of Mr. Powell, the defendant is guilty of first degree murder.

The other thing I would ask you to keep in mind when you listen to the testimony is not just the question of who pulled the trigger as well. I submit to you at the close of the case the evidence will be that Mr. Walton pulled the trigger and shot and killed Tom Powell but there's, you all heard about accomplices, that is a person who is responsible as well for the conduct of somebody else. If he's [33] working together, if he is assisting, aiding, looking out while an armed robbery is being committed and a killing results, he has the same intent to commit that felony, so I ask you to consider that, it doesn't matter, Mr. Hoover is as guilty as Mr. Walton even though Mr. Walton pulled the trigger because he's involved in the commission of the felony. That's the second way.

* * *

[Excerpt of Direct Examination
of Sharold Ramsey]
Tucson, Arizona
December 12, 1986

[103] * * *

Q. Did anyone of the three of you take that gun with you when you went out to the Swap Meet this second time?

A. Yeah.

Q. Who took it?

Q. Mike.

Q. How do you know he took it?

A. I seen it.

Q. When did you see the gun?

A. I guess before we left the trailer.

Q. Okay. You guess. Do you remember seeing it before you left the trailer or not?

A. No.

Q. Did you see it at any point after you left the house to go to the Swap Meet the second [104] time, did you see that gun?

A. Yeah.

Q. Who had it when you saw it?

A. Mike.

Q. When you left the trailer and went to the Swap Meet the second time, up until that point had their been

any conversations between you, the defendant in this case and Robert Hoover about robbing somebody?

A. Yes.

Q. Did you talk about it at the trailer there?

A. Yeah.

Q. Was anybody else there when the three of you were talking about it?

A. Not that I remember.

Q. Did you talk about it on the way out to the Swap Meet?

A. I don't think so.

Q. What did you talk about at the house, and when I ask about your talking, just those times when this man, this defendant is sitting there, what did you say about robbing somebody?

A. Just that we were going to rob somebody. I think an old man that was drunk.

[105] Q. Why?

A. I guess so he wouldn't remember us the next day.

Q. When you say you guess, who suggested robbing an old man?

A. Well, that's just what I thought.

Q. Were there conversations about that?

A. About him not remembering things the next day if he was drunk?

Q. About it being an older man?

A. Yeah.

Q. Who talked about it being an older man?

A. All of us.

Q. And this was before you even leave the house?

A. I'm pretty sure.

Q. Did you still not have any money?

A. No.

Q. What about Mr. Hoover, did he have any money at that time?

A. No.

Q. Did Mr. Walton ever tell you, well, we don't need to do that, I got some money?

A. No.

Q. Did he say one way or another that he [106] had or didn't have money?

A. I'm pretty sure he didn't have money because we didn't have cigarettes or nothing.

Q. Okay. You didn't have cigarettes or nothing that day?

A. No. if he had money he would have had cigarettes.

Q. So when you left the house and you went out to the Swap Meet, after you got out to the Swap Meet did you stay there for awhile?

A. He walked around for a little while, everybody was closing up so we left.

Q. When you left did you leave walking or riding or what?

A. We were walking.

Q. As you were walking were there any other conversations between yourself and Mr. Hoover and Mr. Walton about robbing somebody?

A. Yeah.

Q. What did you talk about?

A. Just like where we were doing to do it.

Q. What were you going to do, what were the three of you talking about, what was it you talked about?

A. Just to tie him up and leave him [107] somewhere and take his car so we could get back home.

Q. Mr. Walton was part of the conversation about robbing him and tying him up and taking his car?

A. Yes.

Q. He was there and discussing it with you and Mr. Hoover?

A. Yeah.

Q. Did he ever say no, I don't want any part of it, it's a bad idea, I won't do it?

A. No.

Q. Did any of the three of you object to that?

A. No.

Q. You ever say, no, I don't want to do that?

A. No.

Q. You started, did you go back down East Speedway, did you start down Speedway Boulevard?

A. Yes.

* * *

[109] Q. At some point, ma'am, after you left the Alpha Beta did you end up out at a parking lot of a bar?

A. Yeah.

Q. What was the name of the bar?

A. Terry and Zekes.

Q. Had you ever been to that bar before?

A. No.

[110] Q. Did you stop and hang around out in the parking lot?

A. Yeah.

Q. How long had it been before you stopped and hung around in the parking lot at Terry and Zekes that you had hitched a ride with somebody?

A. Couple hours, I guess.

Q. Had you had anything to drink that day?

A. No.

Q. Had you smoked any marijuana that day as of the time you get in the parking lot at Terry and Zeke's?

A. Just when we hitched a ride we smoked a couple joints.

Q. When you hithced (sic) a ride who all smoked a joint?

A. All of us.

Q. All of us being who, yourself?

A. And Rob and Mike and the guy driving and his girlfriend.

Q. So you say when you got this ride a couple hours before you smoked marijuana?

A. Yes.

Q. How much marijuana?

A. Just a couple of joints.

[111] Q. Okay. Were you affected or feeling the effects of the marijuana when you got to the parking lot at Terry and Zekes?

A. No.

Q. Besides the marijuana that you had that day, had you had any other kinds of drugs or alcohol or anything like that?

A. No.

Q. To your knowledge, to your knowledge had Robert Hoover taken any drugs or smoked any marijuana or drank a beer or had any alcohol besides the two or the couple joints or the joints that you passed around in this car that you got a ride in?

A. No.

Q. What about the defendant, did you see him drinking anything that day?

A. No.

Q. Did you see him besides these two marijuana cigarettes, did you see him smoke any marijuana or take any drugs that day?

A. No, not that I remember.

Q. Did you notice anything strange about his behavior, was he acting intoxicated or anything like that?

A. No.

[112] Q. Did he have any trouble talking with you and understanding what you were saying?

A. No.

Q. When you get out to the parking lot at Terry and Zekes, tell us exactly what the tree of you do, what you do, what Mr. Hoover does and what the defendant does when you are at this parking lot?

A. We just were waiting for someone to come out. And Mike was playing with the van, thinking that maybe he could get in and wait for someone to come out and get into the van.

Q. Wait a minute. Mike was playing with a van, what was he doing?

A. He was just seeing if he could get in.

Q. He was trying to get into a van?

A. Yeah.

Q. What kind of a van?

A. A Volkswagon van.

Q. Did he ever say why he was trying to get into the van?

A. So maybe he could get in and wait until somebody came out and got inside the van.

Q. What were you doing when Mike the defendant was playing or trying to get into this van?

A. Just standing up against the wall of the [113] bar.

Q. Leaning up against that wall?

A. Yes.

Q. What was Robert Hoover doing?

A. Standing with me.

Q. With you, Robert Hoover, when you say he was standing with you were you standing out there kissing or hugging each other or what were you doing?

A. I don't remember.

Q. How far away from you and Mr. Hoover was the defendant when he was trying to get into this van?

A. He was about four feet, I don't know.

Q. Not that far away?

A. Not really.

Q. What do you remember about the van, can you tell us as much as you can?

A. It was an orange VW van.

Q. And how, did Mike ever manage to break into or get into the van?

A. No.

Q. Did anyone of the three of you ever get into the van?

A. No.

Q. Did anyone else, did anyone ever come [114] out of the bar while you were standing out there in the parking lot?

A. Yeah.

* * *

[115] Q. Who came out of the bar, can you tell us what the person looked like?

A. He was tall and he had a crewcut.

Q. Crewcut?

A. Yes.

Q. You have to say yes or no?

[116] A. Yeah.

Q. Do you remember thinking about the kind of clothes he had an (sic)?

A. I think he had a white shirt on.

Q. When he came out did he go to the side of the bar there where you were leaning up against the wall?

A. Well, he went, he went around the, the back of the van. He walked around the back of it instead of walking down in front of the building.

Q. The man walked around the back of the van?

A. Yeah.

Q. Where was Mike trying to break into the van, was it the front, the back, the side?

A. The side.

Q. All right. When the man walked around the back of the van, did you or Mr. Hoover do or say anything to Mike when the man came out of the bar?

A. Just Rob whistled.

Q. Rob whistled?

A. Yes.

Q. Had you talked about Rob whistling if anybody came out?

A. No.

[117] Q. Rob just did that?

A. Yeah.

Q. After the man walked around the back of the van did you see him go to a car?

A. Yeah, he went in between the van and the car.

* * *

[118] Q. So when the man came out and Rob whistled what's the next thing you saw or heard?

A. I walked forward to where the van, because the van was blocking my way and I walked up and Mike had the gun on the man and just told him to get down and he put his stuff up on top of the car.

Q. When you say you walked over there, did Rob Hoover stay where he was or did he go with you?

A. He walked over there with me.

Q. And the gun that you saw Mike had, is that the same gun that you had seen before or a different one?

A. It was the same one.

[119] Q. When you say he came around, he had the gun on the man, what was the man doing?

A. He just put his hands up after he put the stuff on top of the car.

Q. What did Mike say if anything to the man at the time the man raised his hands?

A. I don't remember.

Q. Did he say something to him?

A. I don't remember.

Q. What did the man do?

A. He got on the ground. Just laid down.

Q. He was laying there on the ground next to the car?

A. Yeah.

Q. You say he put something on the top of the car, the man did?

A. Yeah, cigarettes and the keys and his lighter.

Q. What about his wallet?

A. I think he might have put his wallet up there too.

Q. Did one of you tell him to do that?

A. I think he just done that automatically.

Q. So he takes all these things out and then lays down on the ground after he puts all these [120] things on top of the car?

A. Yeah. I don't know if he was told to lay down or if he just done it, I don't remember.

Q. At that point did you say, I don't want to be involved, and take off?

A. No.

Q. You stayed there, didn't you?

A. Yeah.

Q. At any time did the man get up from the ground?

A. Yeah.

Q. Why did he get up, what made him get up?

A. I guess somebody told him to get up and get in the car.

Q. Who told him?

A. I don't remember.

Q. Do you remember that he was told to get in the car?

A. Yeah.

Q. You just don't remember who said that?

A. No.

Q. Did you get in the car?

A. Yeah.

Q. Where did you get in the car, the front or back?

[121] A. I got in the front.

Q. What did Mr. Hoover do, where did he get into the car?

A. He was driving.

Q. How did he get the keys?

A. Mike threw the keys to him.

Q. Mike threw the keys to Robert Hoover?

A. Yes.

Q. So where did the man get in the car?

A. He got in the back seat.

Q. What about Mike?

A. He got in the back seat.

Q. What did you do after all four of you got in the car?

A. We drove, Out.

Q. Where did you drive to?

A. To Gates Pass.

Q. Were you familiar with Tucson at that point and Gates Pass and Old Tucson?

A. No.

Q. You were familiar with Speedway Boulevard?

A. Yeah. I had been on Speedway before.

Q. So which way did you go on Speedway?

A. I don't know. Just, we just drove down [122] Speedway.

Q. When you say down Speedway would that be towards downtown?

A. I don't know.

Q. When you got the man in the car and you started driving, had the three of you talked about tying him up?

A. Yeah.

Q. Did anyone of the three of you have anything to tie the man up with when you stopped him in the parking lot of that bar?

A. No, not that I know of.

Q. How long did you drive approximately?

A. Not very long. I don't rememver.

Q. And okay, when you drove was it still light when you finally stopped driving the car?

A. No, it was dark.

Q. Were there lights out there?

A. There were no lights.

Q. Was the man talking while you were driving to where you finally went?

A. He was just answering questions because everybody was asking him questions about where he lived and stuff and if he had anymore money.

Q. How much money did he have?

[123] A. I think 45 dollars or something.

Q. And who was asking him if he had more money?

A. Just Rob and Mike, I don't remember.

Q. Were you talking to the man too?

A. No.

Q. Besides answering questions that were being asked, what else did the man say?

A. He said if we wanted to he would give us a ride somewhere and he wouldn't tell nobody.

Q. The three of you didn't take him on that?

A. No.

Q. You didn't stop the car, did you?

A. No.

Q. You kept driving?

A. Yeah.

Q. How was the man acting when this was going on?

A. Just scared.

Q. How do you know he was scared, what was he saying, what was he doing?

A. I don't know, you could just tell, I guess.

Q. You are in the front seat and the man is [124] in the back seat?

A. Yeah.

Q. You are sitting on the passenger's side on the front seat, which side is the man on as you were arriving out to this area?

A. He was behind me.

Q. Directly behind you?

A. Yeah.

Q. Were you surprised when you went all the way out to where you finally stopped the car?

A. I didn't really think about it.

Q. You didn't even think about it?

A. Not really.

Q. Did you finally stop the car and get out?

A. I didn't get out, no.

Q. Did the car finally stop somewhere?

A. Yeah, they pulled over on a I guess it was a pullout.

Q. What happened?

A. On the side of the road.

Q. What happened after you pulled out on the pullout?

A. Mike and the man got out and Rob and Mike were just arguing about what they were going to [125] tie him up with or whatever, and then Rob said he didn't care what he tied him up with, just hurry, and he got back in the car.

Q. What's the man doing when they are arguing about what?

A. I think he was back on the ground.

Q. How was the man acting after you pulled up at the pullout and they got out of the car?

A. He was scared.

Q. How do you know?

A. I don't remember. I just told him not to be scared because he wouldn't be hurt and then he got out of the car and then I guess he just got back down on the ground, I don't remember. I don't remember seeing him standing.

Q. So while Mike and Robert Hoover are arguing what to tie him up with you don't remember seeing the man standing up there?

A. No.

Q. Was he laying down next to the car on the ground?

A. I think so, yes.

Q. What happened after Rob Hoover said, I don't care what you tie him up with, just hurry up?

A. He just got back in the car.

[126] Q. What?

A. He got back in the car.

Q. Who did?

A. Rob.

Q. What about Mike, did he get back in the car?

A. No, he went out in the desert.

Q. And the man that had been in the car, what did he do?

A. He went with him.

Q. He's with Mike?

A. Yeah.

Q. Did Mike say anything to you as he walked away from the car?

A. He said to turn up the radio.

Q. To turn the radio up?

A. Yeah.

Q. Did you do that or did Mr. Hoover do that?

A. I don't remember.

Q. The radio was turned up, was it, ma'am?

A. Yeah.

Q. You turned it up real loud?

A. Really loud.

Q. And you and Mr. Hoover sat there in the [127] car?

A. Yeah.

Q. Up until the time Mike walked away from the car with the man had the man said anything or said who he was or what his name was, anybody ask him that, anybody care?

A. I don't remember him saying his name. He said about where he lived he said the area where he lived. But I don't remember him saying his name. I remember him saying that he had to go pick up his check. The next day. From the base or whatever. And that he had given his mom some money for his sister's rent or something. That's why he didn't have any more money.

Q. Did he ever say anything that – strike that. How long was Mike gone from the car with the man?

A. I don't know. Not very long.

Q. When you say not very long?

A. About five minutes, I guess.

Q. When Mike came back to the car, was the man with him?

A. No.

Q. What did Mike do when he got back to the car?

[128] A. He just jumped in the back seat and then we turned down the radio and he said that was loud. I

asked him what was loud and he said it sounded like a rifle or something like that, I don't remember. And then he said not to ask any more questions.

Q. Did you ask any more questions?

A. No, I just turned back up the radio.

Q. Did Mike talk to Robert Hoover or did Robert Hoover ask Mike any questions?

A. No.

Q. So what did the three of you do after Mike got back in the car and said that was really loud?

A. We went to Carl's Jr. on Oracle.

Q. What did you do at Carl's Jr.?

A. We bought hamburgers and stuff at the drive-through and we went home.

Q. Where did you get the money to buy the hamburgers?

A. From the man.

Q. Who had the money when you went through Carl's Jr. to buy the hamburgers?

A. Mike.

Q. Did you pay for the food or did he?

A. I think he handed it up to the front [129] seat and we gave it to them.

Q. What did you do after you went to Carl's Jr. and bought some hamburgers?

A. We went home.

Q. Is that home the same place on Miracle Mile?

A. Yeah.

Q. Was Teresa there when you got there?

A. Yeah.

Q. Anybody else?

A. Just the kids and her mom but I think that they were asleep.

Q. I'm sorry, who was asleep?

A. Teresa's mom, and the kids.

Q. Was Teresa awake?

A. Yeah, she woke up when we came in.

Q. Did you guys have any beer with your hamburgers?

A. Yeah, she had some beer when we got back.

Q. After you're back at the house and you are having your hamburgers and drinking the beer did Mike say anything else about what happened?

A. Yeah, he said that he should have checked the guy's pulse. To see if he was dead.

[130] Q. Mike said what?

A. Yeah.

Q. What else did he say?

A. He said that he had to be dead because he shot him in the head.

Q. What else did he say?

A. I don't remember.

Q. Did he ever talk to you about the man peeing in his pants, urinating in his pants?

A. Yes.

Q. Tell the jury what he said.

MR. HIGGINS: I will ask for more foundation as to when this happened.

MR. PEASLEY:

Q. Let me ask you, when did Mike make this statement about that?

A. I don't remember.

Q. Would it have been that same night or some other time?

A. It was that night.

Q. Who else was present at the time Mike was making these statements?

A. Me and Teresa and Rob.

Q. And what did Mike say about the man urinating?

[131] MR. HIGGINS: Your Honor, I would object and ask for more foundation because Teresa was there.

THE COURT: Objection is overruled.

MR. PEASLEY:

Q. What did he say?

A. He said he never seen a man pee in his pants before.

Q. And is this the conversation where Mike's saying all these things, is it the same time or a different time when you are sitting there having your hamburgers and drinking your beer?

A. It was about the same time.

Q. Did you ever see the gun after you got back to the trailer there?

A. Yeah.

Q. Tell the jury how that happened?

A. He just, he took out the shell. And put it in his pocket.

Q. Who did?

A. Mike.

Q. Did you see one shell or more then one shell?

A. Just seen one shell.

Q. Do you know, could you see whether theere (sic) were any other bullets in the gun or just the [132] one or do you know?

A. I don't know.

Q. Did Mike ever say anything about putting his foot on the man when he shot him?

A. I don't remember him saying that.

Q. Do you remember telling Detective Reuter when you talked to him that Mike had said he put his foot on the back of the guy's neck and shot him in the head?

A. Yeah.

* * *

[Excerpt of Direct Examination of David Bilodeau]
Tucson, Arizona
December 15, 1986

[12] * * *

Q. And when Mr. Dickerson, (sic) the defendant in this case, when he came over, you said it was about two o'clock in the morning?

A. Yes, sir.

Q. Were you in bed or what were you doing?

A. We were in bed.

Q. Did you get up when he came to the door?

A. Yes, sir.

Q. Tell the jury, did he come inside the house?

A. Yes, sir.

Q. After he came inside, did you have conversations with him?

A. Yes.

Q. Would you relate to the jury what the conversations were that you had with him?

A. He knocked on the door and he came in and he told me that he had just shot someone and that he [13] needed some dynamite. And I told him that I had had some problem with the law and that I didn't have any dynamite.

And the conversation just went on from there.

Q. What else did he say, sir?

A. Well, he wanted to get rid of the car.

He told me he had been out drinking and he went out to Gates Pass with this fellow he said was in the armed services. He didn't mention what branch.

And he said they got out there and the guy was wising off and he just reached over and he shot the guy in the head.

Q. This was what the defendant told you about what he had done?

A. Yes, sir.

Q. Did anyone come inside the house with the defendant when he came in and told you these things?

A. No, sir.

Q. Did you ever ask him any questions about what he was telling you?

A. Yeah.

Q. What did you ask him?

A. Where it had happened, where the gun was.

Q. What did he say when you asked him where it [14] had happened?

A. He said it happened out at Gates Pass.

Q. What did he say when you asked, if anything, when you asked him about what he did or how he did it?

A. Well, he said they were sitting around drinking and he said the guy was wising off and he asked him a couple of times to knock it off and the guy didn't knock it off.

So he just reached over and shot him.

Q. Did you ever ask him what he shot him with?

A. Yeah.

Q. What did he say when you asked him that?

A. He showed me a gun that he had in his back pocket.

Q. When you say he showed it to you, will you tell the jury how he did that?

A. Well, he reached into his pocket like this and he pulled a gun and it was in a holster and he showed me the gun.

Q. Can you describe the holster to us that you saw, sir?

A. It was a brown holster.

Q. What can you tell us about the gun that you saw?

[15] A. I believe it was a .22. It looked like a .22 derringer, up and over.

Q. When you say up and over, what do you mean?

A. Two shot.

Q. Okay. Were the barrels side by side or on top of one another or what?

A. I believe they were up and over, one on top of the other.

Q. One on top of the other?

What was the defendant saying when he showed you the gun that he showed you, sir?

A. Well, I asked him, you know, what he did with the body. And he told me he dragged it up underneath a tree.

He said he needed to get rid of the car and he asked me –

Well, I told him that he should get rid of the car. And –

Q. Did you ever tell him what he should do with the gun, if anything?

A. I told him he should leave it in the car.

Q. Why did you tell him that?

A. Well, like I say, I had just gotten into some trouble and I didn't need any further trouble. And I figured if he left the gun in the car, then the gun [16] would be there, fingerprints could be taken off it.

Because I didn't want to be an accessory.

Q. Did you think by his coming over that you could be an accessory to what it was that he had done?

A. If I didn't report it, yes, sir.

Q. Did you have any conversations with him about what he had taken from the man, if anything?

A. He said he took his wallet, he said around twenty dollars in cash and that was it.

Q. Were there any conversations about any identification belonging to the man?

A. Yes. He said he had burned all the identification.

* * *

[Excerpt of Prosecutor's Closing Argument]
Tucson, Arizona
December 16, 1986

[165] * * *

It for some reason in the course of your deliberations you don't feel that there was premeditation, and one of the jurors says, I don't think he really meant to. What if? What if? Then I'm asking you to go back and take a look at the felony murder rule. Because if in in (sic) your deliberations you decide that there wasn't premeditation, you focus in on the felony murder rule and if you have an armed robbery and a kidnapping, if you have one of those serious offenses and a death occurs in the course of committing that or in [166] furtherance of that then you have first degree murder. And I submit to you that the State has presented sufficient evidence to support convictions under both theories. Under both theories.

* * *

[196] So let me ask you this, Ladies and Gentlemen, and let's make a couple of assumptions for a moment, the judge is going to give you some other instructions, so let's make a couple of assumptions. Let's assume, let's assume that Becky Bolanos when she testified was accurate when she said she heard a conversation between Hoover and Ramsey. Make that [197] assumption if you will.

Let's assume further when she heard that conversation, we don't know for sure, let's assume it was true. Let's assume there was a party, let's assume at that party

Hoover took a gun, let's assume further that gun that Hoover took is the gun that was used in this case.

Let's make all those assumptions. In fact let's go even further. Let's assume that when they get out to the Gates Pass area and Thomas Powell was made to lie down on the ground and then get up and walk into the desert, let's assume it was Mr. Hoover who walked him out in the desert, let's do that for a moment, or Miss Ramsey if you choose. Let's assume either one of those. That it was they instead of Mr. Walton which we know is true, they instead of he walked him out in the desert with a gun; make that assumption for a minute and if you do, the judge is going to tell you that the defendant is accountable not only for his own conduct but for the conduct of his accomplices.

If Ms. Ramsey walked Thomas Powell out into the desert with a gun stolen by Mr. Hoover at a biker party, if Ms. Ramsey is the one who put her foot on Thomas Powell's neck and shot him in the brain; if [198] Miss Ramsey is the one who does that and he is an accomplice, he is just as guilty of first degree murder as if he pulled the trigger himself.

And Mr. Higgins when he's talking to you makes a statement, remember his statement, Shari Ramsey is a murderess, and indeed that is true. He starts to make a statement she is murderess just as Mr. Walton, then he catches himself, might be. Just as he might be.

Well, Sharold Ramsey is guilty of murder as well. She was involved and she was an accomplice and there was an agreement reached and I will talk about that some more before we end up with what we are talking about

here today. Shari Ramsey is guilty, Walton is guilty and Hoover is guilty and it simply doesn't matter who pulled the trigger. That is nothing more than a red herring. What Mr. Higgins would have you do is go back in the jury room and get into discussions and start disagreements about who pulled the trigger and who had the gun.

And I would submit to you, first, there's no question and the evidence I submit to you is overwhelming he did. Even if you go back there, wait a minute, wait a minute, what about this Becky Bolanos, what about maybe it was Hoover who stole the [199] gun, what about it, it could have been Hoover. Could have been Hoover who took the gun, could have been Hoover who pulled the trigger. It could have been Shari Ramsey.

If somebody says that back in the jury room I would ask you to point them to a couple of instructions. I will not read them, the judge will tell you what that law is, he will read every one of them to you and you will have a chance to look at them. I will not read everything, I'm not trying to mislead. One of them says a person is criminally accountable for the conduct of another if the person is an accomplice of such other person. Accomplice is a person who with the intent to promote or facilitate the commission of an offense aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense. End of story. Mr. Walton when he is working with Mr. Hoover and Miss Ramsey, they all are accomplices of one another. They are all accountable not only for their own direct conduct but for the conduct of each other.

Who pulled the trigger? I submit to you it simply doesn't matter. And when you answer the

* * *

[Excerpt of Judge's Instructions to the Jury]
Tucson, Arizona
December 16, 1986

[217] * * *

A person commits first degree murder is such person acting alone or with one or more other persons commits or attempts to commit armed robbery or kidnapping and in the course of and in furtherance of such offense or immediate flight from such offense such person causes the death of any person. This type of first degree murder requires no specific mental state other than that which is required for the commission of the offenses of armed robbery or kidnapping.

With respect to felony murder, the State is not required to prove that the defendant actually committed armed robbery or kidnapping, only that he [218] intended or attempted to do so.

With respect to the felony murder rule, insofaras it provides the basis for a charge of first degree murder, it is not necessary that the State prove that the defendant intended to kill. It is only necessary that the State prove that the defendant intended to commit the crime of armed robbery or kidnapping.

The crime of first degree murder requires proof of the following three things. The defendant caused the death of another person; and number two, the defendant knew that he would cause the death of another person; and number three, the defendant acted with premeditation.

Premeditation means, one, that the person either intends or knows that his conduct will result in death to another person.

And number two, his intent or knowledge exists before the killing long enough to permit reflection.

An act is not done with premeditation if it is the instant effect of sudden quarrel or heat of passion. But no appreciable length of time must elapse between the formation of the intent to kill and the act, they may be as instantaneous as successive thoughts of the mind.

* * *

[Jury Question and Answer]
Tucson, Arizona
December 16, 1986

[6] * * *

THE COURT: One other thing I wanted to make a record on, if counsel don't mind coming up here just a second.

(The following proceedings were had at the bench:)

THE COURT: The last note that came out of the Jury room which is filed with the Clerk of the Court, was, "For a person to be guilty of felony murder, does he actually have to pull the trigger?", and Mr. Peasley was in my officer and read the note verbatim to Mr. Higgins.

Mr. Higgins suggested sending the note back with the following: "Please review the felony murder instruction and the accomplice instructions," which the Court did verbatim, and it was stipulated to by the County Attorney. Is that correct?

MR. HIGGINS: That's what happened, Judge.

MR. PEASLEY: That's correct.

ARIZONA SUPERIOR COURT, PIMA COUNTY

STATE	)	
	)	
v	)	NO. CR-17537
	)	
JEFFERY ALAN WALTON	)	
	)	VERDICT
Defendant	)	HON. THOMAS
	)	MEEHAN
	)	

We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty of FIRST DEGREE MURDER as alleged in Count One of the Indictment.

Filed: December 16, 1986

/s/ Larry Dempsey Imman
Foreman

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE COUNTY OF PIMA

[Sentencing: Proffer of Jury
Foreman's testimony]
Tucson, Arizona
January 26, 1987

[248] * * *

MR. HIGGINS: I have Larry Inman who was the foreman of the jury outside, if you want to argue that we can do that. And I would like to call him if I can.

MR. PEASLEY: As I indicated to Mr. Higgins 24.1 and *State versus Hall*, which is 129 Arizona 589 and *State versus Callahan*, 119 Arizona 217, I think it's clear that jury affidavits or testimony are not admissible insofar as they concern the deliberating process of jury members. And Mr. Higgins apparently intends to elicit testimony from Mr. Inman concerning his deliberation process during the course of the jury deliberations in this case. The State would move to preclude it as not being [249] appropriate either by virtue of live testimony or affidavit.

MR. HIGGINS: Judge, I am going to ask him a couple of things. I know what the case law and rule 24 says. That goes to their mental processes as to assenting or dissenting from the verdict, I am not going into that, I'm going to ask questions in these two areas briefly, that being whether the jury utilized the felony murder or premeditated murder which were both submitted to them

over my objection in their deliberations, he will tell you the felony murder.

And then I would ask him if they considered, if the jury considered premeditated murder and he will answer yes, but never could decide on who pulled the trigger.

The reason that's important is because since the *Enmund* case, a Supreme Court case, and *MacDaniels* followed it in our Supreme Court, they found if the felony murder rule was used, Your Honor, because we don't have a jury decision on this, Your Honor has to decide whether the defendant killed, attempted to kill or intended to kill and that goes to the weight of that. The jury could not reach that decision and that's the arbiter of that fact.

[250] I will not go into things that go into the verdict, under the case law they can proceed under either or both. But I am going to ask which one and why. And that's all. I'm not going into the other things. And there are other things that arguably would affect the verdict and I am not going to question about that. That way I think there's not an invasion of the juror's province and it is a factual determination.

MR. PEASLEY: I don't know how much more you can inquire into the deliberation process than to be asking upon what the jury based its verdict. He's down here pursuant to a subpoena, he had to answer the subpoena; and to put a juror on the witness stand under subpoena and start making inquiries about the deliberating process I think is entirely improper under the rules. I would oppose the request, I frankly disagree from my understanding with some of the things Mr. Higgins says

but I don't want to start bantering about a jury decision because I think it's improper, I would move to preclude this testimony.

THE COURT: Show the motion to preclude the juror's testimony is granted. And Tom, I will accept that as an offer of proof for purposes of the record.

[Sentencing argument by
Defense Counsel and Prosecutor]

Tucson, Arizona
January 27, 1987

[282] * * *

MR. HIGGINS: Yes, sir I am going to read off factors that I think the Court can conclude from the evidence go to mitigation. I believe just before I mentioned the lack of flight and helping the [283] officers find the body and cooperating. The mental state testified to by Dr. Gurland is the end result of a viscious set of circumstances where as indicated in the materials, the sexual problems and difficulties and horror with his own mother and in the early years lead to an attempt to escape and cope and he did it as best he could.

Then I think there is substantial impairment shown at the time in question. And such cannot be made up and I would ask Your Honor to draw your attention to that tape recording, not the transcript but the tape of the statement of my client. Mr. Walton could not have faked the emotion, could not have faked quick enough to portray a series of events which only existed in his mind. He did not remember what went on there.

And I also think that there is evidence that he did not do the shooting. And that there is a probability should be enough in the Court's mind to impose an error on the side of the life sentence instead of the death penalty.

There's the ownership of the gun that you heard and both Shari Ramsey and Robert Hoover making a statement that matched each other, both as to the lie of the California events when they had the gun [284] but also as to where they got the gun, and the last witness testified what she overheard about that.

There is some evidence that the defendant shot Mr. Powell and that evidence came from his mouth and statements afterwards, I shot someone. And from Hoover and Ramsey.

The other mitigating factor that is important as your Honor knows and I already mentioned is the age of the defendant. But what really bothers me, and this is getting away a little bit from the mitigation but I think it's a consideration, it seems in this case if you are a victim that's a Marine and have a family and lots of support, that is going to result in a defendant being given the death penalty; whereas if you are a transient you are not.

Those letters that were appended, and I think improperly to the pre-sentence memorandum, there's no way in the aggravating circumstances that the grief of the family should be taken into account in what you do. It this was a case involving a transient it wouldn't be a concern, it's because he did have a family who were horribly upset, who are stricken, but that's not it, you cannot base a decision on life or death on who the victim was.

I would rather not be here, you would rather [285] not be here and Mr. Walton would rather not be here. But the community upset and outrage and the media attention because of the status of the victim are not grounds to

do that, that's why they're not listed in the aggravating circumstances. If you look at *State versus Watson*, this is the type of case that is not for the death penalty because it is not one of the aggravating circumstances cases. The State's memorandum pointing out things that they think go to cruel, heinous and depraved is just speculation and nonsense. The only thing we know is that no one knew that Mr. Walton was out there, that's why I objected to Your Honor considering that testimony as to what happened after he was shot. To be a depraved, cruel person, you have to know what was going on. And there is no indication that they knew.

And I think lack of remorse at the time also is not an aggravating circumstance. But I think throughout this and the fact that he cooperated and went to his fate with the detectives is an indication there was and is remorse. On the part of my client.

The fact he may end up if you decide to give him life imprisonment, 25 calender years in prison, he would be 45 years old before he was eligible for parole. Your Honor is aware of the so-called burnout [286] age for people in criminal activity, and that's over it. And I would ask you to treat this case like you treated a lot of other ones and give the benefit of the doubt that I know is in you to Mr. Walton.

THE COURT: Mr. Peasley.

MR. PEASLEY: It strikes me as interesting that Mr. Walton's lawyer gets up and talks about giving him a chance to live. Mr. Powell during this event, we had testimony to this effect, asked for his chance to live and Mr. Walton answered that by walking him out in the

desert and putting his foot on his neck and shooting him in the back of the head.

There are two aggravating circumstances, notwithstanding what Mr. Higgins said, and the Court has had the opportunity to review the memorandums submitted by the State and the memorandum by the defense and I am sure the Court is aware of cases that neither one cited, but those two aggravating circumstances are clearly established.

The offense was committed for pecuniary gain, Mr. Powell was robbed to get the money, a death resulted, the death was part of that, it was not an incidental thing that happened.

They took him from the bar and drove him out [287] to the desert area, when they didn't have anything to tie him up with, Mr. Hoover in his statement that this Court heard talks about one of the things that they were arguing about was what to do.

If you want to talk about cruelty to Tom Powell, for seven or eight or nine days that man is out in the desert. And it's not speculative as to what happened. The pathology report indicates the man was blinded, wandered around the desert with pneumonia, dehydration, running into cactus, falling down, trying to get up and not knowing where he was, not knowing whether he was near help or not, whether he was going further or closer to the road.

If you want to stop and put that aside for the minute then I think the cases are clear too that you can consider Mr. Powell and what must have been going through his

mind as he taken from that bar parking lot out to the desert area, it's not just a question of what happened after he was there, what about the period of time after taking him from the parking lot, being taken down Speedway where there are lights until finally he's getting away from the lighted areas, he's becoming concerned; imagine the things going through that man's mind as he was in that car, no real explanation, take my money, take my car, I'll [288] drop you off, anything, just don't hurt me. No reason at all.

—

Imagine, imagine the terror that Tom Powell was experiencing and that's cruelty. It's mental as well as physical suffering of the victim in this case. Imagine what was going through his mind when he was being told to get down in the car, one of them saying everything will be okay, conversations about where do you live, how much money do you have, things went on, then they get out to the pullout there in the desert and then they get out, and when Mr. Higgins uses the word in Mr. Walton's letter, animal, that seems to be a very accurate description at this point, then they get out there and then they have Mr. Powell lay down by the side of the car while Mr. Walton and Mr. Hoover stand there and argue about what to do with him or what to tie him up with.

Imagine laying on the ground with your face down on the ground while two animals talk about what's going to happen to you, what they're going to do. The suffering that he endured even before he gets to the desert. And afterwards he's wandering around, there is tremendous – it's beyond belief what that poor man was made to suffer because this man decided he wanted to take something

from [289] somebody. Because he ended up with somebody younger, he had wanted somebody elderly, that was what he was talking about initially, now its was somebody he was concerned about and he was going to shoot and kill and any suggestion that's not what he wanted to do and he didn't do exactly what he intended is ludicrous, he shot and killed Tom Powell, and that's what he was going to do.

Then the defendant gets up and hands a two or three page little note that he wants read to the Court to make us all see what a humanistic person he is now. Mr. Powell doesn't have the opportunity to live his life. The testimony is, Mr. Higgins comes out and says, let's not consider the feelings of the victim's family, that's inappropriate. They don't have Tom Powell anymore, And he's not around. They can't talk to him, they can't touch him, they can't do things with him and this man is the man who took his life away, he shot him in the head and left him out in that desert and Mr. Higgins says somehow he should be rewarded because he's younger.

The Court's familiar with those cases, unless age causes a substantial impairment of judgment it is not a mitigating circumstance, it's *Gerlaugh*, it's a number of cases, he's not so young under the [290] circumstances, this is not impulse. They talked about it, they planned around it, they looked for it, stopped at two or three different places until they get to where Mr. Powell is located and Mr. Powell is taken in the car, that's not a mitigating circumstance.

Then Mr. Higgins would have you reward the defendant because he didn't flee at some point, he helped the

officers find the body of Tom Powell. Well, the Court heard that statement. Mr. Walton started out by lying about it. Mr. Walton, oh, yeah, there were tears, I am sure they were sincere but they were not tears for Tom Powell. They were tears for Mr. Walton because he had been caught, tears because he didn't know what to do, more questions were asked that were more difficult to answer, then finally he started making admissions and lead the police to an area where the body was found only about 15 days after he left him out there.

Did he know? I suggest to the Court the evidence is and Mr. Walton knows that as well when he says I should have checked his pulse. I should have checked his pulse. Mr. Powell did move, said something that caused Mr. Walton to believe when he left that perhaps Mr. Powell wasn't dead.

[291] And that suffering that was endured for those eight or nine days is something that's attributable to Mr. Walton as well when he makes those statements. When you talk about cruelty you have not only the trip out there but what he endured later. When you talk about heinous and depraved you are talking about the mental attitude of the defendant afterwards.

What we have is a man who would have us believe because he reads a two or three page statement to the Court he somehow should get life instead of death after he did what he did to Mr. Powell. That heinous and depraved is what he does afterwards. I have never seen anybody pee in their pants before. Like this is an interesting, curious thing, this is how concerned he is. It's a

novelty for him, he has never had that experience before, now he has.

Now what he does is he goes and celebrates his experience by buying hamburgers and eating hamburgers and drinking beer, that is his relishment of the act.

Let's talkd (sic) about the case. It's unnecessary. What was done to Tom Powell was unnecessary, they could have taken his money as he offered, they could have left him there, they didn't have to kill him.

There are two aggravating circumstances that [292] are clearly established factually and legally. There are no mitigating factors. To the extent that the Court would consider there's any mitigating factors at all present, they are not substantial enough to call for leniency.

The State on behalf of the community and the victim's family in this case would ask the Court to impose the sentence that is called for, the only sentence that's called for in this case and that is the death penalty.

* * *

[Court's pronouncement of sentence]
Tucson, Arizona
January 27, 1987

[292] * * *

THE COURT: Mr. Walton, you having been found guilty by a jury of count one, first degree murder, a dangerous non-repetitive class one felony, it's the judgment of the Court that you are guilty.

The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.

The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.

The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been [293] significantly impaired but not so impaired as to constitute a defense to prosecution.

The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the pre-sentence report and all other mitigating circumstances as stated by your attorney on the record this date.

The Court finds the following aggravating circumstances. Number one, that you committed the offense in an extremely heinous, cruel or depraved manner.

Number two, that the offense was committed for pecuniary gain.

The Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Therefore it is the sentence of the Court as to count one, first degree murder, that you be committed to the custody of the Arizona State Department of Corrections, from there to be put to death in the manner prescribed by law.

You having been found guilty by a jury of count two, armed robbery, a dangerous, non-repetitive class two felony, it's the judgment of the Court that you are guilty. The Court finds the same aggravating [294] circumstances.

In addition thereto the Court finds the following aggravating circumstances. Your prior felony convictions, the traumatic anxiety and loss to the victim's family; your failure to benefit from prior rehabilitative efforts on your own behalf.

The Court further finds that you are a significant danger to the community.

Therefore the Court finds that the presumptive sentence is not appropriate, it is the sentence of the Court that you be sentenced to the Arizona State Department of Corrections for imprisonment for the aggravated term of 21 years.

You having been found guilty by a jury of count three, kidnapping, a dangerous non-repetitive class two felony, it's the judgment of the Court that you are guilty. The Court finds the same aggravating circumstances. It's the sentence of the Court that you be committed to the

custody of the Arizona State Department of Corrections for imprisonment for the aggravated term of 21 years.

You having been fund (sic) guilty by a jury of count four, theft by control of property over 1,000 dollars, a nondangerous, nonrepetitive class three felony, it's the judgment of the Court that you are [295] guilty. The Court finds the same aggravating circumstances. It's the sentence of the Court that you be committed to the custody of the Arizona State Department of Corrections for imprisonment for the aggravated term of 10 years.

Counts two, three and four to run concurrent with each other, but consecutive to count one.

The date the sentence is to begin is as of today. And Sharon, do you want to file the notice of appeal, please.

* * *

FILED
January 27, 1987
JAMES N. CORBETT, Clerk
/s/ S. Cottrell Deputy

SUPERIOR COURT OF ARIZONA

PIMA COUNTY
TUCSON, AZ

[James N. Corbett]

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

NO. CR-17537

STATE OF ARIZONA

VS

JEFFREY ALAN WALTON

DATE OF BIRTH: 1/29/66

County Attorney
By: Kenneth Peasley and
Kate Dawes
Thomas Higgins

Defense Counsel

SENTENCE OF IMPRISONMENT

8:30 a.m. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

Court Reporter Deirdre Muzall is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant knowingly, intelligently, and voluntarily waived his

right to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

Date 1/28/87 By D 205, Deputy

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a

sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated on the following page. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

As to Count One, FIRST DEGREE MURDER,

THE COURT FINDS beyond a reasonable doubt that the defendant caused the victim's death.

The court has considered the following mitigating circumstances:

1) Competency to appreciate the wrongfulness of his conduct or to conform his conduct as to the requirements of law was impaired but not so impaired to prevent a prosecution.

2) The court also considered all other mitigating factors as set forth in the presentence report and as presented by his attorney this date.

THE COURT FINDS the following aggravating circumstances:

1) That the defendant committed the offense in an especially heinous, cruel or depraved manner.

2) That the offense was committed for pecuniary gain.

THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency, therefore,

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count One, FIRST DEGREE MURDER

FELONY CLASS: 1

IN VIOLATION OF A.R.S. SECTIONS: 13-1105; 13-703; 13-710

DATE OF OFFENSE: 3/2/86

SENTENCE: IT IS THE SENTENCE OF THE COURT that defendant be committed to the Arizona State Department of Corrections and there to be put to death in the manner prescribed by law.

[ ] Mitigated [ ] Presumptive [ ] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B) [ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class ___ felony, nondangerous/dangerous, convicted in ___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[ ] This sentence is to be concurrent with___

[ ] This sentence is to be consecutive with___

and the reasons therefore are stated by the Court on the record.

This sentence is to date from January 27, 1987. The Defendant is to be given credit for 323 days served prior to sentencing.

MINUTE ENTRY
JEFFREY ALAN WALTON

Page No. 4 Date January 27, 1987 Case No. CR-17537

As to counts Two, Three and Four,

THE COURT FINDS the same aggravating circumstances. In addition thereto,

THE COURT FINDS the following aggravating circumstances:

Prior felony conviction; traumatic anxiety and loss caused to the victim's family; defendant's failure to benefit from prior rehabilitative efforts in his behalf.

THE COURT FINDS a significant danger to the community, therefore.

Sharon Cottrell
Deputy Clerk

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Two, ARMED ROBBERY

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1902; 13-1904(A)(1) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class___felony, nondangerous/dangerous, convicted in___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[ ] This sentence is to be concurrent with___

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Three, KIDNAPPING

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1304(A)(3) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class___felony, nondangerous/dangerous, convicted in___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[X] This sentence is to be concurrent with Count Two

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Four, THEFT BY CONTROL OVER $1,000.00

FELONY CLASS: 3

IN VIOLATION OF A.R.S SECTIONS: 13-1802(A)(1) and (C); 13-604

DATE OF OFFENSE: 3/2/86

SENTENCE: ten (10) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[X] Nondangerous [ ] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___
a Class___felony, nondangerous/dangerous, convicted in___

2. ___
a Class___felony, nondangerous/dangerous, convicted in___

[X] This sentence is to be concurrent with Counts Two and Three

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

MINUTE ENTRY
JEFFREY ALAN WALTON

Page No. 8 Date January 27, 1987 Case No. CR-17537

IT IS ORDERED that Thomas Higgins be withdrawn as attorney of record.

IT IS FURTHER ORDERED Harold Higgins be pointed to represent defendant on appeal.

Sharon Cottrell
Deputy Clerk

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

[ ] ORDERED exonerating any bond.

[ ] ORDERED granting the State's Motion to Dismiss

—

ORDERED authorizing the Sheriff of Pima County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

FILED: Notice of Rights of Appeal, signed by the Defendant.

[X] ISSUED: Order of Confinement

10:00 a.m. Hearing concludes.

/s/ illegible
JUDGE OF THE SUPERIOR COURT

cc: County Attorney (3)
Thomas Higgins, Esq.
Harold Higgins, Esq.

Department of Corrections - 3 certified
Arizona Supreme Court, Phoenix AZ
Sheriff - 3 certified
Adult Probation - 1 certified
Appeals
Hon. John G. Hawkins
Hon. Thomas Meehan
Court Administrator
[Signature Security (fingerprint) Identiprint]

STATE of Arizona, Appellee,

v.

Jeffrey Alan WALTON, Appellant.

No. CR-87-0022-AP.

Supreme Court of Arizona,
En Banc.

Feb. 2, 1989.

HOLOHAN, Justice (Retired).

The defendant, Jeffrey Walton, was convicted of first degree murder, armed robbery, kidnapping, and theft by control for abducting, robbing and killing Thomas Powell. He was sentenced to death on the murder conviction and to prison terms on the noncapital felony convictions, to be served consecutively to the death sentence.

The facts developed at trial are that the defendant and his two co-defendants, Robert Hoover and Sharold Ramsey, had planned to rob at gunpoint some "old man that was drunk," take his car, tie him up, and leave him in the desert area outside of Tucson while they fled from the state in his vehicle. Instead, they encountered a young marine, Thomas Powell, in a bar parking lot. They took his wallet and keys and forced him into his car with them. They then proceeded out of the city on Speedway Boulevard to Gates Pass where they pulled off the road in a secluded spot. Having no materials suitable for tying up Powell, they forced him to lie face down on the ground while they debated his fate. Ultimately, the defendant took the gun and marched Powell into the darkness, leaving the other two in the car. The defendant instructed the co-defendants to "to turn up the radio." After a short walk, the defendant again forced Powell to lie prone on

the ground; he shot the victim once in the head and hurried back to the vehicle.

The victim had been rendered unconscious and blind by the shot, but he eventually regained consciousness. Weakened and hampered by his blindness, he floundered in the desert. Approximately a week after the shooting, the victim died from exposure and pneumonia.

Soon after the killing, the defendant asked David Bilodeau for dynamite to destroy the victim's car, explaining that he had killed someone and needed to dispose of evidence. Mr. Bilodeau promptly related this information to police who eventually arrested the trio. The defendant gave the police a statement and led them to the murder area where they found Powell's body less than a day after he had succumbed.

We have jurisdiction pursuant to art. 6, § 5(3) of the Arizona Constitution and A.R.S. § 12-102 and § 13-4031. We affirm the conviction of guilt and sentences on all counts.

The defendant presents twenty-seven issues for our review. For the sake of brevity, we consolidate those into the following issues:

I. Rule 11: Whether the defendant should have had greater opportunity to develop evidence of incompetence despite a pre-Rule 11 screening indicating no incompetence.

II. Election of Murder Theories: Whether the state should have elected between premeditated and felony murder theories.

III. Voluntariness of Statement: Whether the defendant had voluntarily rendered his statement to the police.

IV. Voir Dire: Whether the jury had been impermissibly tainted by pretrial publicity and the judge's comment at voir dire.

V. Evidence: Whether the judge erred in evidence admissibility rulings.

VI. Jury Instructions: Whether the judge erred in instructing the jury.

VII. Death Sentence: Whether the Arizona death penalty is unconstitutional, and it was properly applied by the trial court when sentencing the defendant to death.

VIII. Prison Term Sentences: Whether the trial court erred in imposing prison terms on the noncapital offenses consecutive to the death sentence, and whether the trial court erred in considering the impact of those offenses on the victim's family to aggravate the prison sentences.

IX. Ineffective Assistance of Counsel: Whether the defendant's attorney provided ineffective assistance.

I. RULE 11

Defendant first contends that the trial court erred when it denied his request for a Rule 11 competency evaluation and continuances to develop evidence of incompetency and insanity.

A. *Rule 11 Evaluation*

Rule 11.1, Arizona Rules of Criminal Procedure, provides that the state shall not try anyone who is "unable to understand the proceedings against him or to assist in his own defense." If a defendant appears incompetent, any party may request a competency examination. 17 A.R.S., Rules of Crim.Proc., Rule 11.2. Pursuant to Rule 11.3, if the trial court determines that reasonable grounds exist for an examination, mental health experts are appointed to examine the defendant. Prior to making the determination whether reasonable grounds exist, the trial judge may order a preliminary evaluation of the defendant. *State v. Johnson*, 147 Ariz. 395, 398-99, 710 P.2d 1050, 1053 (1985).

In the present case, the court ordered a preliminary evaluation of the defendant by Dr. Hinton, a psychologist with the Pima County Court Clinic. Dr. Hinton reported that the defendant displayed no signs of incompetence nor insanity. The trial court therefore concluded that there was no reasonable grounds for a Rule 11 examination. Under similar circumstances, we have held that the report of the psychologist was "more than sufficient . . . to base a conclusion that defendant could assist in the preparation of his defense," hence the trial court did not abuse its discretion when it denied the motion for a Rule 11 examination. *State v. Borbon*, 146 Ariz. 392, 395, 706 P.2d 718, 721 (1985).

After the denial of the motion for mental examination, the defendant made several additional requests for a Rule 11 examination. However, the only showing made by the defense was the existence of a childhood history of

psychiatric referrals and some blackouts caused by substance abuse. The trial court ruled, and we agree, that these matters were not relevant to show present incompetence to stand trial. Nonetheless, the defendant persistently argued that the trial court should treat amnesia and a history of substance abuse as evidence of incompetence. The trial court declined to accept the defense's theory. We find no abuse of discretion in the trial court's rulings.

In addition, the defendant also wanted a Rule 11 evaluation to provide him with evidence bearing on his insanity at the time of the offense. However, he never gave notice, as required by Rule 15.2(b), Ariz.R.Crim.P., that he would allege an insanity defense, nor did a subsequent mental examination conducted prior to sentencing disclose any basis for an insanity defense. The defense was not entitled to expert assistance on a defense he had no intention or basis to use. Therefore, we hold that the trial judge did not err by refusing to grant a Rule 11 examination.

B. *Continuances*

On several occasions, the defendant sought continuances to develop evidence of incompetence or insanity related to his history of substance abuse and speculated mental illness. The court granted the defense counsel's first motion for continuance to allow him additional time for trial preparation. The trial court also ordered a preliminary mental evaluation of the defendant. After the examination and report by Dr. Hinton, subsequent

motions for continuances to develop evidence of insanity were denied.

As noted above, the defendant is not entitled to continuances to gather evidence of insanity when he has not sought an insanity defense. Moreover, because the evidence he hoped to develop during continuances (memory impairment) is immaterial to his present competency and guilt, *People v. Amador*, 200 Cal.App.3d 1449, 246 Cal. Rptr. 605 (1988), the trial judge did not abuse his discretion in denying the second and subsequent requests for continuances.

II. ELECTION OF MURDER THEORIES

Defendant next contends that the trial court erred when it refused to force the state to elect between premeditated and felony murder in trying him for first degree murder. The defense contends that the jury might have been confused by two theories, and defense counsel states that he encountered difficulty in preparing cross-examination strategy.

Initially we note that in *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982), we held that first degree murder is a single crime whether it is tried on the ground of felony murder, premeditation, or both. *id.*, 132 Ariz. at 496, 647 P.2d at 627. Therefore, the state was not required to elect between the two methods of committing first degree murder.

We turn to the defendant's specific complaints. First, speculation about "*potential* confusion among jurors" is insufficient to establish actual jury confusion. Second, the

defense counsel has not provided us with any legal authority that supports his proposition that due process should relieve him of the burden of complex trial strategies. Counsel cannot complain that preparing for felony murder as well as premeditated murder placed an undue burden on him when he had to prepare a defense against the felony charges alleged in the indictment, two of which were underlying felonies for the murder charge. He was not forced to choose between theories either, rather then simply prepare to defend against several theories. We therefore hold that the trial court did not err when it refused to order the state to elect to try the case on only one theory for first degree murder.

III. VOLUNTARINESS OF STATEMENTS

The defendant next contends that the trial court erred when it denied his motion to suppress statements he made during police interrogation. In support of his fifth amendment claim, defendant refers the court to three statements made by the detective:

1) "It's nothing that can't be worked out,"
2) "to lie isn't going to help," and
3) "Give yourself a chance."

He asserts that those statements constituted promises which overbore his will, rendering his subsequent confession involuntary.

To determine the voluntariness of a confession, the court must evaluate the "totality of the circumstances" surrounding the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854

(1973); *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957). The "totality of the circumstances" test is a highly fact-intensive test. Courts applying that test must consider details of interrogation, the specific police tactics, and the suspect's personal characteristics. *Rachlin v. United States*, 723 F.2d 1373, 1377 (8th Cir. 1983). The crucial issue is whether police conduct overbore a suspect's will. *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954).

The Supreme Court has held that confessions extracted by threats or violence, or direct or implied promises, are involuntary. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed. 2d 747 (1970); *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); *Bram v. United States*, 168 U.S 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897). Thus, even without making an express promise, police who imply a benefit to the suspect in exchange for his information will not be permitted to introduce the resulting confession at trial. *State v. Burr*, 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980); *State v. McFall*, 103 Ariz. 234, 236, 439 P.2d 805, 807 (1968). Nonetheless, police may use less egregious psychological tactics to obtain confessions. *See Haynes v. Washington*, 373 U.S. 503, 514-15, 83 S.Ct. 1336, 1343-44, 10 L.Ed.2d 513 (1963).

Preliminarily, we turn to the latter two challenged statements: "give yourself a chance," and "to lie isn't going to help." Because they are no more than the detective's opinion and advice, those statements do not evoke fifth amendment protections. *See State v. McVay*, 127 Ariz. 18, 20, 617 P.2d 1134, 1136 (1980) (a statement couched in terms of an opinion is insufficient to render a confession

involuntary); *Laub v. State*, 24 Ariz. 175, 177, 207 P. 465, 466 (1922) (the mere statement that it would be better to tell the truth does not render the confession involuntary); *State v. Hall*, 120 Ariz. 476, 479, 586 P.2d 1288, 1291 (App. 1978) (an officer's advice that telling the truth would have favorable impact on the suspect's sentence did not render the ensuing confession involuntary). Therefore, the latter two statements do not constitute impermissible promises or threats that implicate fifth amendment rights.

Next we note that "it's nothing that can't be worked out" clearly is not an express promise because it did not offer a benefit in exchange for information. *Accord Burr*, 126 Ariz. at 340, 615 P.2d at 637. Nonetheless, the defendant asserts that phrase constitutes an impermissible implied promise. *See id*, 126 Ariz, at 340, 615 P.2d at 637. We examine the context in which the police made that statement, the "totality of the circumstances," *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. at 2047-48, for guidance.

The detective had interrogated the defendant for approximately 45 minutes before he began to confront him with information about the murder. After less than a minute of detailing facts of the incident, the detective stated:

> "It's like I told you, you know, it's heavy and it's nothing that can't be worked out. You don't seem like the type of man who is going to try to run from a misstake [sic]. I want you to tell us the truth and to get it off your chest."

As the detective pressed him with more specific questions, the defendant persistently denied any participation in and knowledge of the crime, and offered an alibi. With continued probing, however, the defendant

gradually changed his claim from noninvolvement to not remembering the incident. That, too, slowly gave way as the defendant began to "remember" some collateral information. Then he broke into tears and took a break.

The detective resumed confronting him with details of the crime until the defendant, again reduced to tears, began to remember minor details directly related to the incident. Approximately forty minutes lapsed between when the detective said that it can be worked out and when the defendant began to admit incriminating details; over the next two-hour period, the defendant gradually revealed more.

It is clear from the context of the whole interrogation that the defendant did not respond to the statement as if he understood it to be a promise. Instead, for approximately 45 minutes afterward, he continued to deny any involvement in the incident. When he at length offered some information, he did so not in response to a promise, but due to the continued confrontation with known details and the effect that had on his guilt or fear of retribution, compounded by the need to provide more facts to extricate himself after he had implicated himself. In *Hall*, we held that the defendant must have relied on the promise before we will find his statement involuntary. 120 Ariz. at 457, 586 P.2d at 1269. From the context of this interrogation, it is clear that the statement of the detective did not constitute a promise. The actions of the defendant show that he did not treat the detective's statement as a promise. Therefore by saying, "it's nothing that can't be worked out," the detective did not render the defendant's subsequent statement involuntary.

Having examined the entire record, *Davis v. North Carolina*, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895, 898 (1966), and considered the totality of the interrogation, *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. at 2047-48, we find that the three statements were not promissory in nature, and they did not induce the defendant to make a statement. The defendant's fifth amendment rights were not violated, and the trial court did not err when it refused to suppress the defendant's statements.

IV. VOIR DIRE

The defendant next contends that the trial court erred when it denied his request to declare a mistrial after voir dire. He bases his claim on two circumstances: (1) thirteen prospective jurors indicated some exposure to the case through the media; and (2) the judge commented that sitting on this jury would probably upset a prospective juror whose cousin had been murdered by the Tison gang.

A. *Pretrial Publicity*

It is not whether prospective jurors have heard of the crime, but their prior exposure to information about the crime that is the important factor in the defendant's right to an impartial jury. Prior knowledge of a case alone is insufficient to disqualify a juror. *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984). A trial court can strike a panel due to exposure to pretrial publicity only when the defendant has shown that the jurors "have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside." *Id.*

(citing *State v. Mulligan*, 126 Ariz. 210, 214, 613 p.2d 1266, 1270 (1980)). A defendant must show that the jury was actually prejudiced by pretrial publicity, or that the publicity was so outrageous that prejudice could be assumed. *Murphy v. Florida*, 421 U.S. 794, 800-803, 95 S.Ct. 2031, 2036-38, 44 L.Ed.2d 589 (1975); *State v. Joseph Smith*, 123 Ariz. 231, 236, 599 P.2d 187, 192 (1979).

The court impaneled only three of the thirteen jurors who had been exposed to information about the crime, and each of the impaneled jurors stated that they could set that knowledge aside in reaching a verdict. The defense made no showing that the statements of those jurors were not credible. The trial court did not err in denying a mistrial.

B. *Judge's Comment*

The judge asked prospective jurors whether they could put their personal feelings aside and decide the case based on the evidence and instructions. One prospective juror answered, "My cousihn [sic] and his wife were killed by the Tyson [sic] gang, and I think listening to this type of testimony it would bother me." The judge responded, "It is probably going to be upsetting," and excused her. The defendant contends that the judge thus informed jurors of his personal opinion of the aggravated nature of this case, severely prejudicing the defendant. We disagree.

The comment by the judge simply acknowledged his agreement that the juror's past experiences could interfere with her objectivity in a murder trial. The comment did not imply that the defendant was guilty or that the

crime charged was especially offensive. It was merely a sympathetic response to the obviously emotional condition of the prospective juror. The comment did not constitute error.

Additionally, we note that the defendant failed to object to the impaneling of the jury. In fact, he expressly approved the panel. If counsel had timely objected, the judge could, if necessary, have promptly corrected any error. Counsel must make his objection during voir dire or waive that right. *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554. (1978). Moreover, he cannot object to the panel once he has approved it. *Id.* (citing *Glover v. State*, 273 Md. 448, 330 A.2d 201 (1975); *People v. Cobb*, 19 Ill.App.3d 520, 311 N.E. 2d 702 (1974)).

The trial court enjoys broad discretion in granting a mistrial, and we will reverse the lower court's ruling only if the court's conduct is palpably improper and clearly injurious. *State v. Coleman*, 122 Ariz. 130, 133, 593 P.2d 684, 687 (App.1978), *aff'd in part*, 122 Ariz. 99, 593 P.2d 653 (1979). The denial of the defendant's mistrial motion was not error.

V. EVIDENCE

The defendant next contends that the trial court's various rulings on admission of evidence and argument of counsel constituted error. Specifically, he complains of the court's following rulings: (1) it permitted the deceased's mother to testify; (2) it restricted the defendant's cross-examination of a witness' drug history; (3) it declined to declare a mistrial when the prosecutor extended his closing argument beyond the facts of the

case; (4) it admitted the murder weapon after closing arguments; and (5) it admitted Dr. Hinton's pre-Rule 11 screening report at the sentencing hearing.

A. *Testimony of the Victim's Mother*

Defense counsel filed a motion *in limine* to exclude Ms. Powell's testimony because it was irrelevant and would inflame the jury. He was especially concerned that she would testify about the victim's life and background, as well as here feelings about her son's murder, to garner sympathy. The prosecution summarized her expected testimony: she would testify that her son, a marine, was visiting her and asked to borrow her car to "go out to have a beer;" the description of her vehicle; describing his appearance when he left; waking up the next day and finding that he had not come home; calling the police and filing a missing persons report; that California authorities contacted her after finding her car in San Luis Obispo; finally, that she gave a statement to the Tucson police.

Defense counsel assented: "if they are going to do what they say, there's nothing of evidentiary value anyway and I will accept that." Ms. Powell's testimony subsequently conformed to that agreement, and the defendant has directed our attention to no testimony exceeding it. Therefore, the defendant cannot now complain that the trial court should have precluded that testimony. "[I]t can hardly be said that the court denied [the defendant] a right which [he] had waived." *Cobb*, 19 Ill.3d at 522, 311 N.E.2d at 704. Therefore, we find no error in the denial of the motion *in limine*.

B. *Cross-examination of Witness' Drug History*

The state called David Bilodeau to testify concerning admissions the defendant made to him. The witness had a lengthy history of substance abuse but was not under the influence of drugs at the time the defendant spoke to him. The state sought to exclude on relevancy grounds evidence of the witness' drug history beyond his use at the time when he heard the defendant's admissions. Defense counsel argued that the history was admissible to explain discrepancies in Mr. Bilodeau's testimony and impeach his memory, but made no offers of proof beyond bare speculation. The court granted the state's motion.

A trial court should admit relevant evidence but exclude that which has little probative value when it would confuse issues, unfairly prejudice the jury, or invade the witness' privacy. 17A A.R.S., Rules of Evid., Rule 403; *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). A witness' ability to perceive or recall critical facts is highly relevant to his credibility. Nonetheless, a trial judge does not abuse his discretion when he excludes testimony about a witness' psychiatric history when the defendant fails to make an offer of proof that the witness' perception or memory was affected by his illness. *Id.*, 134 Ariz. at 513, 658 P.2d at 166-67.

Contrary to the state's assertion, because the evidence of Mr. Bilodeau's drug use history might affect his ability to accurately perceive and remember the defendant's statements, it could be relevant. Nevertheless, as in *Zuck*, the defendant failed to show that it would indeed be relevant through an offer to prove how it impaired his memory and perception. Without some basis to believe

that Mr. Bilodeau's substance abuse affected him at the time, the trial court did not abuse its discretion when it granted the state's motion in limine.

C. *Closing Argument Exceeding the Facts*

In the rebuttal part of his closing argument, the prosecutor said,

> Sometimes sitting at the prosecution table and listening to the defense attorney testify is one of the more difficult things we have to do, frankly. . . .If you come down here when you are done with your service in this case, come down to the Courthouse and watch some trials in progress, you will get a chance to hear much of what's just been said to you by [defense counsel] . . . I'm sick to death of coming in here and on just about every trial listening to allegations about prosecutorial misconduct, police misconduct, witnesses lying, making up stories, a deal bringing somebody to fit in; you can do what you want in every case you hear.

By complaining of defense attorneys' tactics of displacing blame, and inviting the panel to attend other trials where it would hear reiterations of those arguments, the prosecutor exceeded the facts and law of the case at hand. Counsel should confine his argument to the pertinent law and facts of the case. *State v. Merryman*, 79 Ariz. 73, 75, 283 P.2d 239, 241 (1955). When he referred the jury to other cases, the prosecutor exceeded the limits of proper argument.

However, the defendant never objected to the argument. When counsel fails to object at trial, he is precluded from raising the matter on appeal unless the error is

fundamental. *State v. Stoneman*, 115 Ariz. 594, 596, 566 P.2d 1340, 1342 (1977). Fundamental error affects the foundation of the case or deprives the defendant of a right essential to his defense. *State v. Gamble*, 111 Ariz. 25, 26, 523 P.2d 53, 54 (1974).

The prosecutor's frustration with defense attorneys' strategies does not rise to the level of fundamental error. It neither affects the merits of the case nor deprives the defendant of an essential right. Therefore, absent an objection, counsel is precluded from raising this matter on appeal. *Stoneman*, 115 Ariz. at 596, 566 P.2d at 1342. The defendant nonetheless asserts that the court should have declared a mistrial on its own motion. Because the error was not fundamental, the court was not obligated to declare a mistrial.

D. *Murder Weapon*

At trial, the state sought to introduce the murder weapon into evidence before it had established sufficient foundation. Upon objection, the court denied the request. The state later cured the foundation defects but forgot to have the weapon admitted into evidence. Realizing its mistake after closing arguments, the state requested and the court allowed admission of the weapon. The defendant complains that the foundation was still inadequate when the weapon was admitted, and he was prejudiced by drawing the jury's attention to the weapon just prior to deliberations.

Courts have broad discretion in permitting a party to reopen a case for admission of evidence. *State v. Taylor*, 112 Ariz. 68, 83, 537 P.2d 938, 953 (1975), *cert. denied*, 424

U.S. 921, 96 S.Ct. 1127, 47 L.Ed.2d 328 (1976). They do not abuse that discretion when they allow the state to reopen even after both sides have rested, as long as the state acts in good faith, and the result does not prejudice the defendant. *See State v. Thomas*, 110 Ariz. 120, 131, 515 P.2d 865, 876-77 (1973); *State v. Mendoza*, 109 Ariz. 445, 447-48, 511 P.2d 627, 630 (1973).

Reviewing the record, we disagree with the defendant's contention that the foundation was inadequate. The defendant stipulated to the foundation for admitting the gun into evidence, so he cannot now complaint of insufficient foundation.

The only remaining question is whether the court should have excluded the weapon due to the delayed request for its admission. The trial judge properly exercised his discretion when he found that the state's tardiness was a product of simple inadvertence, not bad faith. In addition, the only prejudice the defendant alleges is that the weapon inflamed the jury just prior to deliberations. However, the jury had already retired before the state made its motion to admit the weapon; hence, the jury could hardly have been affected by it. Therefore, the trial court did not abuse its discretion when it admitted the murder weapon into evidence after closing argument.

E. *Pre-Rule 11 Screening Report*

At the sentencing hearing, the court considered Dr. Hinton's pre-Rule 11 screening report in mitigation. The report contained information supporting several of the factors that the defendant asserted in mitigation. For example, it related serious personal problems that

affected the defendant while he was growing up, and it recounted his substance abuse and psychiatric treatment histories. In particular, Dr. Hinton concluded that drug use probably reduced the defendant's judgment and compromised his impulse control to some extent at the time of the offense. Thus, the report presented important information of mitigating circumstances.

The defendant complains that admitting the report violated the foundation and hearsay rules of evidence. However, information relevant to mitigation can be presented at a sentencing hearing without regard to its admissibility under the rules of evidence for criminal trials. A.R.S. § 13-703(C). The defendant's assertion, therefore, has no merit. We therefore hold that the trial court did not abuse its discretion when it made the foregoing evidentiary rulings.

VI. JURY INSTRUCTIONS

The defendant next contends that the trial court erred in three of its rulings concerning jury instructions. He alleges that the judge: (1) should not have instructed the jury to disregard codefendants' roles in the crime; (2) should have included a "lack of flight" instruction; and (3) should have added commentary instructing the jury that the two theories for first degree murder constitute alternate grounds.

A. *Codefendants' Roles*

The defendant alleges that because his defense was that his codefendant fired the fatal shot, the court should

not have instructed the jury to disregard other participants' role in the crime. The court instructed the jury as follows:

> It is no defense to the crimes charged against the defendant in this case that one or more other persons not now on trial might have also participated or cooperated in the crimes thus charged. The jury is not to speculate upon or even to consider the reasons for the absence from the Courtroom of such other persons if any. As the only matter before you for decision is the guilt or innocence of this particular defendant.

This instruction is a slight variation of R.A.J.I. No. 3.04 (1974).

We have previously determined that the identical instruction that the trial judge gave in this case should not be excluded based upon the theory that someone else committed the crime. *See State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280-81 (1985). We find no significant differences in the facts of the present case that persuades us to change our position in *Cannon*. We find no error.

B. *Lack of Flight*

The defendant alleges that the court should have given the jury his "lack of flight" instruction so that the jurors could have considered his lack of flight in their deliberations. The trial court refused the defense instruction.

Although flight is relevant to guilt, it does not necessarily follow the lack of flight is relevant to innocence. In an analogous case, we noted:

> Instructions on flight seem to be premised on " . . . the supposition that with a consciousness of guilt, 'the wicked flee when no man pursueth' to avoid punishment," as observed by this Court through Justice Lorna E. Lockwood in *State v. Owen*. [citations omitted] Considering the rest of the proverb, " . . . but the righteous are bold as a lion," it would seem to follow that boldness infers innocence. Contemplated, however, is the state of mind of the guilty and the innocent. Verily, flight to escape detection or capture is circumstantial evidence of guilt. Absence of flight under other circumstances may seem far better calculated to avoid detection. Absence of flight does not necessarily reflect the state of mind. Would that detection of criminals were so simple.

State v. Sorensen, 104 Ariz. 503, 509, 455 P.2d 981, 987 (1969). In accordance with our holding in *Sorenson*, we find that the trial court committed no error when it denied a lack of flight instruction.

C. *Alternate Murder Grounds*

The defendant asserts that the trial court should have added a sentence instructing jurors that felony murder was an alternate theory to premeditated murder. He wanted only "some minimal instruction."

The instructions must be read as a whole to determine whether they adequately reflect the law. *State v. Haas*, 138 Ariz. 413, 425, 675 P.2d 673, 685 (1983). Moreover, if the instructions as a whole properly reflect the law in Arizona, *State v. Richardson*, 110 Ariz. 48, 50, 514 P.2d 1236, 1238 (1973), *cert. denied*, 415 U.S. 929, 94 S.Ct. 1439, 39 L.Ed.2d 487 (1974), and are "substantially free

from error," *State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968), the defendant suffers no prejudice by their wording.

In the instant matter, the court presented the appropriate felony and premeditated murder instructions separately, as different grounds for a first degree murder conviction, but omitted the defendant's requested commentary. Because the instructions properly reflected Arizona law, the trial judge was not required to supplement them with the defense's commentary.

Moreover, we note that the jury was aware that the two theories of murder constituted alternate grounds. The prosecutors, in both closing statements as well as opening remarks, explained in detail the two theories *as alternative* means of finding the defendant guilty.

VII. DEATH SENTENCE

A. *Constitutionality*

The defendant next contends that the Arizona death penalty procedure is unconstitutional because: (1) it is facially invalid as cruel and unusual punishment; (2) it denies him his right to jury trial by making the judge the trier of fact at sentencing; (3) it impermissibly places the burden of proof of mitigation on the defendant; (4) it does not require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones; (5) it provides inadequate standards to measure the weigh (sic) to assign aggravating and mitigating factors; (6) its aggravating circumstance of "especially heinous, cruel or depraved" conduct is vague; (7) it restricts the judge's

discretion by mandating capital sentencing when the judge makes certain findings; and (8) it fails to require the judge to enter a "special verdict" explaining each of his findings in detail.

We have previously considered and rejected the first seven arguments and see no reason to change our position. *See State v. Richmond (Richmond I)*, 114 Ariz. 186, 194-95, 560 P.2d 41, 49-50 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977) (death penalty is not cruel and unusual); *State v. Correll*, 148 Ariz. 468, 483-84, 715 P.2d 721, 736-37 (1986) (denial of jury sentencing, burden of proving mitigation on the defendant, no proof beyond a reasonable doubt that aggravation outweighs mitigation, and inadequate standards to weigh the factors are not unconstitutional); *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), *rev'd on other grounds*, *State v. Gretzler*, 135 Ariz. 42, 57 n. 2, 659 P.2d 1, 16 n. 2, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), ("heinous, cruel, or depraved" factor is not unconstitutionally vague); *State v. Bracy*, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986) (restricting judge's sentencing discretion is not unconstitutional).

We have not previously addressed the defendant's final constitutional challenge to the death penalty: that the judge's failure to specify the basis for his findings in greater detail than is required in A.R.S. § 13-703(D) violates the defendant's right to due process. The sentencing statute already requires the judge to return a special verdict setting forth the existence or nonexistence of the

aggravating and mitigating factors listed in the statute. *See* A.R.S. § 13-703(D).

In the present matter, the judge fully complied with that statute. The defendant nonetheless complains that the judge should have set forth the basis for the findings in greater detail as did the judge in *State v. Ceja*, 126 Ariz. 35, 37-39, 612 P.2d 491, 493-95 (1980). We are not persuaded. Although we applaud the meticulous detail the judge applied in sentencing Ceja, we hold that due process requires no more than a clear listing of the factors involved; the defendant's novel claim does not rise to the level of constitutional error.

B. *Enmund/Tison Findings*

Because the jury entered a general verdict of guilty of first degree murder without specifying whether they based it on premeditated or felony murder, the defendant challenges the judge's *Enmund/Tison* finding. He alleges that the trial court misapplied the Supreme Court's test for felony murder sentencing set forth in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and clarified in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Underlying that allegation is his contention that it was his codefendant, Robert Hoover, who actually shot the victim while the present defendant, who never intended that the victim be killed, simply waited in the car. The defendant therefore applies the *Tison* rule to his version of the facts and concludes that the trial court erred.

When the state advances both premeditated and felony murder theories, and the jury renders a general verdict of guilty, the judge must apply the *Enmund* test for felony murder in addition to the sentencing statute criteria for other grounds of murder to reach a capital sentence. *See State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). Thus, he must decide whether the defendant killed, attempted to kill, or intended to kill, as well as find one or more aggravating and no outweighing mitigating factors.[1]

In the instant case, however, the trial judge rejected the defendant's contentions that it was not he, but his codefendant, who killed the victim. The judge found that the defendant was "the person that took the deceased Mr. Powell into the desert, put a gun to his head which resulted in his subsequent death." That finding was

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[1] The defendant also contends that the judge erred when he refused to admit at sentencing the jury foreman's testimony that the jury convicted on the basis of felony, not premeditated, murder. The defendant fails to explain how this affected his eighth amendment rights; presumably he sought that evidence to force the court to apply the *Enmund* test based on the theory the jury used to convict. Because the jury's grounds for conviction are irrelevant to the judge's *Enmund* findings, *Cabana v. Bullock*, 474 U.S. 376, 383, 106 S.Ct. 689, 695-96, 88 L.Ed.2d 704 (1986), the judge did not have to admit evidence of the jury's deliberations.

The defendant further contends that the trial court violated *Enmund* when it sentenced him to death after the jury had been instructed concerning accomplice liability. However, it is not the *jury's* grounds for conviction, but the *judge's* grounds for sentencing that must meet the *Enmund* test. Thus by giving that jury instruction, the judge did not implicate the *Enmund* test at all.

based on substantial evidence. *See id.*, 136 Ariz. at 199, 665 P.2d at 81.

In his statement to the police, the defendant admitted his participation throughout the incident, but credited Hoover with the killing. However, codefendant Sharold Ramsey testified that it was the defendant who took Powell at gunpoint into the desert. Before leaving, the defendant told the others to turn up the radio. He returned approximately five minutes later without Powell, commenting "that was loud," referring to the gunshot. Later, the defendant stated that he should have checked Powell's pulse, but he was sure that Powell was dead because he shot him in the head.

The defendant attempted to impeach Ramsey's testimony by showing that her self-interest and interest in protecting her lover, Hoover, motivated her to lie about who committed the killing. Nonetheless, her story was largely corroborated by David Bilodeau who reported the murder to the police well before the police found and questioned Ramsey.

The defendant attempted to impeach Bilodeau's testimony by showing his interest in receiving favorable treatment from federal authorities in an unrelated matter. The defense presented the inconsistencies between Bilodeau's original statement to the police that the defendant had stated to him, "we killed," and his trial testimony in which he stated that the defendant had stated, "I killed," Bilodeau's pending federal prosecution may have provided an incentive for his *report* of the incident, but the *substance* of the report was substantially consistent with Ramsey's version of the facts.

Having reviewed the record, we find substantial evidence to support the trial judge's finding that the defendant killed the victim. Therefore, the trial judge, following the procedure in *McDaniel*, did not err in making the *Enmund* finding.

C. *Independent Review of Sentence*

Our task is to scrutinize the facts of the present case to determine whether the trial judge erred in his special verdict on the aggravating and mitigating findings.

1. Aggravating Circumstances

The trial judge found two aggravating factors: the defendant committed the offense in an especially heinous, cruel, or depraved manner, and he did so for pecuniary gain. We independently review the record to determine whether the facts establish the presence or absence of the aggravating factors to sustain the imposition of a death sentence. *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51. We must further ensure that aggravating factors were proven beyond a reasonable doubt and all appropriate mitigation was considered. *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576, *cert. denied*, ___ U.S. ___, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). We consider the aggravating circumstances separately.

a. *Especially Heinous, Cruel or Depraved*

First, a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death. *Correll*, 148 Ariz.

at 479-80, 715 P.2d at 733; *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. Mental anguish includes a victim's uncertainty as to his ultimate fate. *Correll*, 148 Ariz. at 480-81, 715 P.2d at 733; *State v. McCall*, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). For instance, in *Correll*, armed assailants bound the victims and drove them into the desert. We recognized that

> this must have caused each victim great distress. This fear and worry must have greatly increased when they were loaded into Cady's car and driven into the desert. At no time could they be certain what these two armed men intended beyond robbery.

148 Ariz. at 480, 715 P.2d at 733.

In the present case, we find ample evidence that Powell suffered substantial mental anguish prior to his death. As in *Correll*, armed assailants abducted and drove him out to a remote area of the desert at night. Powell could not be certain of his fate, but as the city lights grew dim behind him, his fears for his life must have multiplied. He was so clearly terrified by the time they stopped that Sharold Ramsey tried to reassure him that they would not hurt him.

But even if Powell took temporary refuge in her assurances, he soon realized that they meant to kill him. The defendant and Hoover forced Powell to lie face down on the ground outside the car while they argued over his fate. Although they had agreed to tie him up, the defendant, armed only with a gun but no rope to tie him, marched Powell off into the darkness, telling his companions to turn up the radio. The implication was clear to

Powell, who was so upset that he urinated on himself and begged the defendant not to kill him. This evidences that Powell suffered great mental mental anguish both during the car ride when his fate was uncertain and in his final march into the desert when his fate had become certain.

The state also asserts that a finding of especial cruelty can be based upon Powell's physical anguish from the wound, exposure, and conscious suffering in the desert. We have previously indicated that it is the foreseeability of causing the victim physical suffering after inflicting the mortal blow, rather than what surprisingly transpired subsequently, that guides our analysis. *See State v. Bernard Smith*, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). In the present case, the defendant placed the gun to Powell's head, held his head immobile, and pulled the trigger, intending to kill the victim immediately. Because Powell's survival and longevity were neither reasonably foreseeable nor intended, his physical suffering falls outside the definition of cruelty as outlined by this court. *See id.*, 146 Ariz. at 504, 707 P.2d at 302. The trial court's finding of cruelty is supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards.

Second, a crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion. *Gretzler*, 135 Ariz. at 51-52, 659 P.2d at 10-11. For instance, staging a victory celebration after the murder in which the killers sang "We Are the Champions" evidenced depravity. *State v. Lambright*, 138 Ariz. 63, 75, 673 P.2d 1, 13-14 (1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984). In addition, commenting that the defendant "squealed

like a rabbit" when he was shot could support a finding of depravity. *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) (but other circumstances suggested that Graham was motivated by peer pressure, not a depraved mind).

Some circumstances suggest that the present defendant also committed the offense in a depraved manner. After executing the victim, the trio bought hamburgers at a restaurant and went home to eat and drink beer. However, the state produced no evidence that this was a "victory feast." On the contrary, the trio had not eaten because they had no money; their dinner probably provided basic sustenance rather than occasion for celebration.

While drinking beer with his hamburgers, the defendant stated that he "never seen a man pee in his pants before." In argument, the state emphasized that remark as evidence of his callous fascination with the murder. We agree. The statement shows an indifference to the suffering of the victim and evidences a sense of pleasure which the defendant took in the killing.

We have often emphasized that the statutory, expression of "especially heinous, cruel, or depraved" is phrased in the disjunctive, *e.g.*, *State v. Wallace*, 151 Ariz. 362, 366, 728 P.2d 232, 236 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3243, 97 L.Ed.2d 748 (1987), hence a finding of any one of those three factors suffices to constitute an aggravating circumstance. *State v. Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984). The clear evidence of cruelty is sufficient to sustain the trial judge's finding of

that aggravating factor, but we believe that the evidence also supports the finding of depravity.

Third, to prove pecuniary gain, the state must show the murderer's motivation was the expectation of a pecuniary benefit. *LaGrand*, 153 Ariz. 21, 35, 734 P.2d 563, 577 (1987) (citing *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991,1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985)). The killing and robbery need not occur simultaneously, *see Correll*, 148 Ariz. at 479, 715 P.2d at 732, but the purpose of the killing must be to further the defendant's motive of pecuniary gain from the robbery. *Hensley*, 142 Ariz. 598, 603-04, 691 P.2d 689, 694-95 (1984).

For instance, when a robber executes his victim to facilitate his escape and hinder detection, so as to successfully take and keep the stolen items, he furthers his pecuniary gain motive. *Hensley*, 142 Ariz. at 604, 691 P.2d at 694 (to prevent any witnesses from identifying the defendant after the bar robbery, he shot each witness in execution style); *State v. Harding*, 141 Ariz. 492, 500, 687 P.2d 1247, 1255 (1984) (defendant bound and gagged robbery victim, resulting in death to facilitate the robbery and evade detection).

In the present case, the defendant killed Powell to facilitate his robbery. By eliminating his victim, the defendant expected to have time to successfully flee the state with the victim's car and money, thus facilitating his pecuniary goal. The evidence fully supports the trial judge's finding of pecuniary gain as an aggravating circumstances.

2. Mitigating Circumstances

The defendant contends that the trial judge erred when he found no mitigation sufficient to require leniency. Specifically, the defendant alleges that the judge should have found that the defendant's mental capacity was significantly impaired, his actions did not create a grave risk of causing death, and his relative youth mitigated his criminal conduct. The court considered the defendant's mental impairment and age, in addition to numerous non-enumerated mitigating factors, and found no mitigating circumstances sufficiently substantial to call for leniency. The defendant also raises for the first time on appeal the factor of not creating a grave risk of causing death to another as a mitigating circumstance.

The defendant alleges that his mental lapses, attributed to a history of substance abuse, required leniency. The defendant was not under the influence of alcohol or drugs at the time of the offense; he had shared "a couple of joints" of marijuana with four other persons, but was unaffected by that brief usage. Instead, he bases his claim of mental impairment on memory impairment.

Though the judge should consider any evidence of mental impairment to mitigate capital punishment, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), some types of impairments clearly bear more weight than others. For instance, sociopathology and personality disorders have not sufficed to tilt the balance in favor of leniency. *State v. Gerlaugh*, 144, Ariz. 449, 459, 698 P.2d 694, 704 (1985); *Richmond I*, 114 Ariz. at 197-98, 560 P.2d at 52-53. Those differ in degree from a slow, dull,

brain-damaged defendant whose judgment and rationality are marginal. *See Ceja*, 126 Ariz. at 40, 612 P.2d at 496 (because Ceja was not the slow, brain-damaged individual counsel portrayed him as, his minor personality defects did not require leniency). Mental impairments have far greater mitigating effect because they may evidence an inability of the defendant to control his conduct. *State v. Doss*, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977). In the present matter, memory impairment played no role in affecting the defendant's control and by no means caused Powell's death.

Therefore, we find that the defendant's alleged drug-related memory lapses do not warrant reduction of the death sentence. Moreover, before sentencing, the court granted the defendant's request for a psychiatric evaluation, appointing Dr. Gurland, who was the psychiatrist that the defendant had wanted appointed for the Rule 11 examination. Dr. Gurland examined the defendant, agreeing that the defendant may have been subject to drug-related blackouts, but not psychoses or other mental defects. Thus, the defendant's condition was due solely to his abuse of drugs, and his condition did not affect his ability to control his conduct.

Second, the defendant alleges that the judge should have mitigated the death sentence due to the defendant's age, twenty. When the judge considers age in mitigation, he weighs evidence of experience and maturity. *State v. Gillies (Gillies I)*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983). An age of twenty years may be some evidence but is not dispostive of inexperience and immaturity, and we have upheld findings of no mitigation of death sentences in other cases involving defendants of similar age. *E.g.*,

Gerlaugh, 144 Ariz. at 461, 698 P.2d at 706; *State v. Gillies (Gillies II)*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). In addition, the extent and duration of a defendant's participation in a murder can evidence maturity. *Gilles II*, 142 Ariz. at 571, 691 P.2d at 662. Thus carrying out a plan over a significant period of time reflects delay of gratification, which in turn evidences relative maturity; impulsive acts reflect relative youth and immaturity.

In the present matter, the defendant participated substantially throughout the entire course of the crime. Besides the responsibility he shared with his codefendants, the defendant accosted and detained Powell in the bar parking lot, singlehandedly executed him in the desert, and approached David Bilodeau seeking dynamite to destroy the victim's car. This deliberate action minimizes the effect of the defendant's relative youth. Thus, we find that his age is insufficient to call for leniency.

Third, the defendant belatedly alleges that the court should have mitigated the sentence because he could not have reasonably foreseen that his conduct would create a grave risk of death. He bases his argument on his contention that his condefendant executed Powell. However, the trial judge found, contrary to the defendant's contention, that the defendant killed Powell, and there is substantial evidence to support that conclusion. The defendant therefore cannot now allege that he could not have reasonably anticipated that shooting Powell in the head at close range might risk killing him. We find no merit in the defendant's contention that his conduct would not have foreseeably created a grave risk of death.

In addition, we have independently reviewed the record for evidence of mitigation beyond those issues presented on appeal. However, we find no mitigating circumstances sufficient to call for lenience in sentencing.

D. *Proportionality Review*

As part of our independent review,[2] we must also conduct a proportionality review to determine whether "the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Wallace*, 151 Ariz. 362, 370, 728 P.2d 232, 240 (1986); *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51.

For this review, we have considered those cases in which the trial judge sentenced the defendant to death based upon a finding of two aggravating circumstances and no mitigating circumstances sufficiently substantial to require lenience. *E.g., State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984); *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (1984), *cert. denied*, 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 332 (1984); *State v. Libberton*, 141 Ariz. 132, 685 P.2d 1284 (1984). In addition, we have considered those cases in which we have reduced the

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[2] Although the defendant did not challenge the proportionality of his sentence, we are still obligated to conduct a proportionality review of the sentence in this case with that imposed in similar cases. *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51.

death sentence to life imprisonment. *E.g., Graham*, 135 Ariz. 209, 660 P.2d 460; *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981); *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046 (1980), *cert. denied*, 449 U.S. 873, 101 S.Ct 213, 66 L.Ed.2d 93 (1980); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). Finally, we have considered the sentences in the present case that the defendant's codefendants received for their part in the same crime.

Based upon our review of those decisions, we find that the death penalty in the present case is proportional to sentences imposed in similar cases.

VIII. PRISON TERM SENTENCES

The defendant next challenges the sentences imposed on the noncapital felonies. Specifically, he contends that the judge erred when: (1) he considered victim impact evidence; and (2) he ordered that the noncapital sentences run consecutively to his death sentence.

A. *Victim Impact*

Among his death penalty issues, the defendant contends that the trial judge erred when he considered letters of family, friends, and the public in sentencing the defendant to death. He asserts that this violated the restrictions on aggravating factors of A.R.S. § 13-703(F) as well as the eight amendment. *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The Arizona statutory death penalty procedure restricts the trial judge to the consideration of the aggravating circumstances set out in A.R.S. § 13-703(F). The death penalty may not be considered unless the trial judge finds the existence of one of the statutory aggravating circumstances. The impact of the murder upon the family of the victim has never been a statutory aggravating circumstances under the Arizona death penalty statute.

Under the provisions of A.R.S. § 13-702(D), which applies to noncapital sentences, one of the aggravating circumstances that the trial judge must consider is:

> 9. The physical, emotional and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the victim's immediate family.

However, A.R.S. § 13-702 also provides in subsection G:

> Nothing in this section shall affect any provision of law which imposes the death penalty, which expressly provides for imprisonment for life or which authorizes or restricts the granting of probation and suspending the execution of sentence.

Thus, the statutory scheme for noncaptial sentencing is separate and distinct from that applying to the sentence of death or life imprisonment. The ruling in *Booth*, barring the consideration of victim impact evidence, applies only to death penalty cases. *Id.* 482 U.S. at ___ n. 12, 107 S.Ct. at 2536 n. 12. There is no suggestion in *Booth* that victim impact evidence may not be used in noncaptial felony sentencing.

Contrary to the defendant's contention, the judge did not consider victim impact evidence in the capital sentence, but did in sentencing for the defendant's conviction on the non-capital felonies. When the judge indicated he intended to consider the letters in sentencing, he stated that they did not fall under any provisions of the death sentencing statute. It is obvious that he intended to consider that evidence only in determining the sentence to be imposed on the noncapital felony convictions for armed robbery, kidnapping, and theft by control. The trial judge's action is further substantiated by his clear listing of the factors he considered for each type of sentence. The trial judge based the death penalty only on aggravating circumstances of cruel, heinous, or depraved conduct, and pecuniary gain, but he expressly indicated that he arrived at the sentences for the other felonies based upon three aggravating circumstances that included victim impact.

Therefore, the judge only weighed victim impact in sentencing the defendant on the noncapital felonies. We find no error.

B. *Consecutive Sentencing*

The defendant also contends that the trial court erred when it sentenced him to concurrent terms for the robbery, kidnapping, and theft convictions that run consecutively to the death penalty for first degree murder. He relies on A.R.S. § 13-604(H) and the holding of *State v. Perkins*, 144 Ariz. 591, 699 P.2d 364 (1985), barring consecutive sentences for "spree" offenses arising from the same occasion.

A.R.S. § 13-604(H) governs sentence enhancement, not consecutive sentencing. *State v. Noble*, 152 Ariz. 284, 287, 731 P.2d 1228, 1231 (1987). Additionally, we expressly overruled *Perkins* to the extent that it suggests that § 13-604(H) limits a judge's ability to impose consecutive sentences. *Id.*, 152 Ariz. at 288, 731 P.2d at 1232.

Rather, our rule for consecutive sentencing is found in Arizona's multiple punishment statute, A.R.S. § 13-116. In *State v. Tinghitella*, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971), we adopted the "identical elements" test to determine when consecutive sentences violated A.R.S. § 13-116 (then A.R.S. § 13-1641). *State v. Rumsey*, 130 Ariz. 427, 430, 636 P.2d 1209, 1212 (1981), *affd.*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1981). Under that test, the judge must eliminate all elements of one charge and determine whether the remaining facts support the other charges. *Id.*; *Tinghitella*, 108 Ariz. at 3, 491 P.2d at 836.

There was sufficient evidence in the record to independently support each of the charges. We therefore hold that the judge did not err by the consecutive sentencing in this matter.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant finally contends that he was not afforded effective assistance of counsel. He advances four challenges to his counsel's assistance, and we raise an additional concern. We address our concern first.

After the trial judge imposed the sentence in this case he asked counsel if he wanted to represent the defendant on appeal. Counsel replied, "I don't think that's best now,

considering some of the issues." Though counsel did not specify those issues, it is reasonable to assume from counsel's comment that an ineffective assistance of counsel claim would be an issue. The trial judge nevertheless appointed him to continue representing the defendant on appeal.

We believe that the trial judge should have inquired further into the matter before ordering counsel to continue to represent his client on appeal. It is important that appellate counsel be free to advance or reject the issue of effectiveness of trial counsel. We recognize that a defendant, after conviction, is often dissatisfied with the performance of his trial counsel. However, generalized dissatisfaction, without alleging a basis for an ineffective assistance claim, does not suffice to disqualify counsel on appeal. Despite the foregoing, when defense counsel advises the trial court that ineffective assistance of counsel may be an issue on appeal, the better practice is that the trial court should appoint different counsel to represent the defendant on appeal.

Following the trial judge's orders to represent the defendant, counsel directs our attention to four instances in which he alleges he acted ineffectively: (1) he focused his arguments on the distinction between "not guilty" and "innocent" instead of attacking weaknesses in the state's case; (2) he failed to raise at the suppression hearing the detective's promises to the defendant; (3) he failed to timely file a request for a Rule 11 examination; and (4) he stipulated to crucial facts rather than presenting witnesses at trial.

The Supreme Court set forth the standard for courts to apply in evaluating ineffective assistance of counsel claims. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id*. For that, he must specify acts and omissions of counsel that allegedly constituted ineffective assistance. *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). Second, the defendant must show that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To show that, the defendant must be able to demonstrate a "reasonable probability" that the verdict might have been affected by the error. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Schossow*, 145 Ariz. 504, 508, 703 P.2d 448, 452 (1985); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, we must evaluate counsel's performance prospectively. *Id*. Thus, the defendant bears a heavy burden to overcome the presumption that counsel's action "might be considered sound trial strategy" at the time. *Id*. (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

We preliminarily note that defense counsel in the present matter stretches the bounds of credibility when he claims that he should have argued that his client was innocent. Counsel had to realize from overwhelming evidence of involvement in the crime that his client was not

innocent. In addition, the defendant's claim fails to overcome the presumption that his counsel made a sound tactical decision. *See Id*. Moreover, the second and third claims are rendered moot by our holdings that the detective's statement did not constitute a promise and the defendant was not entitled to a Rule 11 evaluation. *See supra*, Sections III, I(A). We turn to the fourth allegation.

The defendant's fourth claim, that counsel should not have stipulated to certain facts, may evidence defects in counsel's assistance, but it fails to meet the second prong of the *Strickland* test, *i.e.*, that the deficiencies prejudiced the defendant. The defendant offers no more than speculation concerning prejudice: the alleged errors "potentially [had] great impact on the ultimate outcome." To show sufficient prejudice, the defendant must point to actual bias he suffered. *State v. Richmond (Richmond II)*, 136 Ariz. 312, 317, 666 P.2d 57, 62, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Mere speculation of prejudice will not suffice. *Santanna*, 153 Ariz. at 150, 735 P.2d at 760. Although counsel's performance was at times deficient, we find that it did not prejudice the defendant. We hold, therefore, that defense counsel's conduct did not deprive the defendant of his right to effective assistance.

In conclusion, we have examined the entire record for fundamental error as required by A.R.S. § 13-4035, *Anders v. California*, 386 U.S 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and find none. We affirm the convictions and sentences.

GORDON, C.J., and CAMERON, J., concur.

FELDMAN, Vice Chief Justice, concurring.

There is no doubt that Walton was a participant in the kidnapping and robbery that eventually led to the victim's murder. Hence, there is no doubt that Walton is guilty of (felony) first degree murder. At the outset, the only issue of consequence in this case was whether Walton's punishment should be life imprisonment or death. The death penalty could be imposed only if Walton was the actual killer or acted, at the least, with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Following the aggravation/mitigation hearing, the trial judge sentenced Walton to death, finding that he had fired the fatal shot. This finding is the issue on appeal. Walton denied firing the shot. In his confession to the police, he accuses Hoover of the actual killing. Hoover, of course, accuses Walton. This is the so-called "mirror image accusation" – each of two very culpable defendants points the finger at the other, seeking some measure of leniency for himself. Hoover's girlfriend, given a very generous plea bargain, unsurprisingly supports Hoover. A witness, Bilodeau, relating one of Walton's admissions, supported Walton in his statement to the police, but more or less supported Hoover in his trial testimony. It is fair to say that given their records, their characters, and the circumstances in which each of these individuals found him or herself, not one of them is especially worthy of belief.

Nor does the physical evidence help us decide who actually shot the victim. Walton owned the murder weapon, but the police found it and the victim's car in Hoover's possession when they apprehended Hoover

and his girlfriend in California sometime after the crime in question.

Evidently the jury also found the question of who actually shot the victim difficult. From the question they asked the court, let alone the statement contained in the foreman's affidavit offered at the mitigation hearing, it is obvious that the jury was unable to decide whether Walton was the actual killer. Under the facts of this case, if Walton was the killer, he was certainly guilty of premeditated murder, but it appears the jury was unable to agree on such a finding.

Thus, this case illustrates a serious problem. The majority quite correctly holds that the United States Supreme Court has instructed us that *Enmund* findings relate only to eighth amendment issues, may be made at any stage of the proceedings, and not necessarily by the jury. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Moreover, the Court has not required us to adopt any particular procedure and has left each state free to adopt its own procedure in making the *Enmund* findings. *Id.* at 385, 106 S.Ct. at 697.

Exercising the discretion later granted us in *Cabana*, in *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983), we held that because there is only one crime of first degree murder, and "where the jury might have found the defendant guilty of [either] first degree murder based on a felony murder theory" or premeditated murder because both theories were submitted to the jury, the trial judge must then make the *Enmund* findings himself. *Id.* at 199, 665 P.2d at 81.

In my view, developments since *Enmund* and *McDaniel* – particularly *Tison* with its standard of reckless indifference – and our experience with the *McDaniel* procedure require a reexamination of the *McDaniel* procedure. In a system that values trial by jury, it seems anomalous to allow a judge to resolve the only true factual issue in the case and, in doing so, to reach a result that may be directly contrary to the jury's finding. Apparently here, the judge's finding was evidently one that the jury considered but was unable to reach.

If we continue to follow the *McDaniel* procedure, we may well produce decisions that conflict with the jury trial principles espoused by the United States Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and by this court in *State v. Hurley*, 154 Ariz. 124, 741 P.2d 257 (1987), and *State v. Powers*, 154 Ariz. 291, 742 P.2d 792 (1987); *see also Adamson v. Ricketts*, 865 F.2d 1011, 1022-1029 (9th Cir. 1988) (en banc) (finding unconstitutional Arizona's death penalty statute because, *inter alia*, it allows the sentencing judge to find the evidence of the elements of the crime of "capital murder").

I believe that, at the very least, we must in the future consider requiring the jury to receive a separate verdict form for the premeditated murder theory in cases that have been submitted to the jury on both felony murder and premeditated murder theories. This use of separate verdict forms would give the judge in sentencing and this court in exercising its responsibility to review death penalty cases the valuable benefit of an actual jury finding, and we would also avoid many of the questions that afflict courts in reviewing death penalty cases.

MOELLER, Justice, concurring.

I agree with Vice Chief Justice Feldman's suggestion that we should adopt, for future cases, the practice of submitting separate verdict forms when, in a potential death penalty case, the case is submitted to the jury on both premeditated murder and felony murder theories. In my opinion, such a change in practice would be prudent in light of developments which have occurred since the existing practice was approved in *McDaniel* and would, I believe, be of great assistance to trial judges and to judges of this court who are attempting to resolve the increasingly complex issues presented by death penalty cases. To this extent, I join in his concurrence.

SUPREME COURT OF THE UNITED STATES

No. 88-7351

Jeffrey Alan Walton,

Petitioner

v.

Arizona

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* by, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 2, 1989

Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-7351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

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QUESTIONS PRESENTED

1. Whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law?

2. Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

   a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

   b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?

3. Whether Arizona's "especially heinous, cruel or depraved" aggravating circumstance, as interpreted and applied by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-7351

JEFFREY ALAN WALTON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The trial judge's special verdict, finding aggravating circumstances and sentencing Petitioner to death, is unreported and appears at J.A. 59. The opinion of the Supreme Court of Arizona affirming Petitioner's conviction and sentence of death is reported in *State* v. *Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989), and reproduced at J.A. 70.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Arizona was entered on February 2, 1989. A timely motion for reconsideration was denied on March 21, 1989. The Petition in this case was timely filed, on May 20, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States:

Article III, Section 2, Clause 3, which provides in part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

The Sixth Amendment, which provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .;

The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves Arizona Revised Statutes §§ 13-703 and 13-1105 (Supp. 1986), which are set forth in full in Appendix A to this Brief.

STATEMENT OF THE CASE

Petitioner Jeffrey Walton was sentenced to death at age 20, by Judge G. Thomas Meehan of the Superior Court of Pima County, Arizona, for the first degree murder of Thomas Powell.

A. The Offense.

In March 1986, Thomas Powell, a 23-year-old Marine, was home on leave in Tucson, Arizona. Tr. 12/12 at 43.[1] On the night of March 2, he borrowed his mother's car, "to go out and have a drink." Tr. 12/12 at 44. When he did not return by the next afternoon, his mother called the police. Tr. 12/12 at 47.

On March 7, 1986, Robert Hoover, 23, and his 16-year-old girlfriend, Sharold Ramsey, attempted a gunpoint robbery in a parking lot outside a Motel Inn in San Luis Obispo, California. Tr. 12/15p 119-20. The victim escaped and the robbers fled; as they ran they threw away a two-shot .22 caliber derringer, which police recovered. *Id.* On March 9, 1986, the car that Thomas Powell was driving the night he disappeared was recovered by San Luis Obispo police near the same Motel Inn. *Id.* at 119. In the car were found identification papers belonging to Hoover and Ramsey. *Id.* at 120.

The next night, March 10, 1986, detectives picked up Petitioner for questioning regarding Hoover and Ramsey, and Thomas Powell's disappearance. Tr. 12/12 at 51. Petitioner admitted knowing Hoover and Ramsey but initially denied knowledge of any crime against Mr. Powell. Tr. 12/15p at 39. However, he eventually broke down crying, and admitted involvement in a robbery in which Mr. Powell was shot by Robert Hoover and left in the desert. *Id.* at 63-64.

The interrogation ended when Petitioner agreed to take the police to the place where he believed Mr. Powell had been shot.

---

[1] The transcript of Petitioner's trial is in several separately numbered volumes. They are referenced in this Brief by date of the proceeding involved, and the page of the transcript on which the reference appears. The proceedings of one day of the trial, December 15, 1986, are reported in two separate volumes, one covering the morning session, and one the afternoon session; page references to these volumes are denominated Tr. 12/15a and Tr. 12/15/p, respectively. Documents not included in the Joint Appendix are referenced by state appellate record (r.) item number and page.

Id. at 84. Investigators were unable to find anything there in the darkness. Tr. 12/12 at 54-55. The next morning, however, they found Mr. Powell's body in the area. *Id.* at 55.

An autopsy showed the cause of death was a single .22 caliber gunshot wound to the head. Tr. 12/15a at 93.[2] The medical examiner concluded that the gunshot wound had not been immediately fatal because Mr. Powell had suffered several additional injuries, apparently as the result of exposure and attempts to walk away from the place where he was shot.[3]

On March 13, 1986, Robert Hoover and Sharold Ramsey were arrested in California. Tr. 12/15p at 120. During police questioning, both Hoover and Ramsey denied any involvement in the Motel Inn robbery. *Id.* at 103, 122. They admitted taking part in the robbery of Thomas Powell but said it was Petitioner who shot Mr. Powell. *Id.* at 101.

B. Petitioner's Trial.

Petitioner and Robert Hoover were jointly indicted, and prosecuted on four offenses in relation to Mr. Powell's death: first degree murder, armed robbery, kidnapping, and theft by control. J.A. 2-5. The cases were separated for trial but set before the same trial judge, the Hon. G. Thomas Meehan.[4]

---

[2] A ballistics examination of the bullet fragment taken from Mr. Powell linked it to the derringer Hoover and Ramsey threw away at the San Luis Obispo Motel Inn. Tr. 12/15a at 62.

[3] *See* Tr. 1/26 at 234-42. The medical examiner concluded that the gunshot wound had blinded Mr. Powell and probably rendered him initially unconscious. *Id.* at 239-40. He surmised that Mr. Powell awoke from unconsciousness, attempted unsuccessfully to walk through the desert, and sustained other injuries in that effort. *Id.* at 241-2.

[4] Sharold Ramsey was charged with similar crimes, but entered into a plea bargain—approved by Judge Meehan—whereby the homicide charges against her were dropped. Tr. 12/12 at 150.

The guilt phase of Petitioner's case was tried to a jury. The testimony and arguments took just under three days. The prosecution's case rested principally upon the immunized testimony of Sharold Ramsey and David Bilodeau and Petitioner's confession to the police.

Sharold Ramsey's testimony included the only detailed description of the offense.

Ms. Ramsey testified that she, Hoover, and Petitioner[5] had decided to commit a robbery on the afternoon of March 2, 1986. Tr. 12/12 at 99. The three had no money and no transportation. They traveled by bus and by hitchhiking. During one ride they smoked "a couple of joints" of marijuana. *Id.* at 110. In the parking lot outside a bar called "Terry and Zeke's" the three encountered Thomas Powell. When Mr. Powell came out of the bar, Hoover whistled, and the next thing Ramsey saw, Petitioner "had the gun on the man and just told him to get down and he put his stuff on top of the car." Tr. 12/12 at 116, 118. Then "I guess somebody told him to get up and get in the car." Tr. 12/12 at 120.

Hoover took the wheel of Mr. Powell's vehicle; Ramsey got in the passenger side; Petitioner got in the back seat with Mr. Powell. Tr. 12/12 at 121. Ramsey testified the drive was "[n]ot very long." Tr. 12/12 at 122. Her description of the events between the time the four drove away from the bar and their arrival at the place where Mr. Powell was later shot was undetailed:

> Q Was the man talking while you were driving where you finally went?
>
> A He was just answering questions because everybody was asking him questions about where he lived and stuff and if he had any money.

---

[5] Ramsey and David Bilodeau refer to Petitioner in their testimony as "Mike," as they knew him by the name of Michael Dickenson. Tr. 12/12 at 95; 12/15a at 8-9.

Q How much money did he have?

A I think $45 or something.

* * *

Q Besides answering questions that were being asked, what else did the man say?

A He said if we wanted he would just give us a ride somewhere and he wouldn't tell nobody.

* * *

Q How was the man acting when this was going on?

A Just scared.

Q How do you know he was scared, what was he saying, what was he doing?

A I don't know, you could just tell, I guess.

Tr. 12/12 at 122-23; J.A. 22-23.

After the four reached the eventual murder scene, Ramsey said, Petitioner "and the man got out and Rob [Hoover] and [Petitioner] . . . were just arguing about what they were going to tie him up with or whatever, and then Rob said he didn't care what he tied him up with, just hurry, and he got back in the car." *Id.* at 124-25. Again, her only description of Mr. Powell's demeanor or actions at this point was that "[h]e was scared." *Id.* at 125. When pressed by the prosecutor to elaborate on how she knew this, she said:

> I don't remember. I just told him not to be scared because he wouldn't be hurt and then he got out of the car and then I guess he just got back down on the ground, I don't remember.

Id.[6]

According to Ramsey, the discussion between Petitioner and Hoover ended when Hoover got into the car and Petitioner took

[6] The Arizona Supreme Court's opinion at one point states that Mr. Powell "begged the defendant not to kill him." J.A. 98. We can find no evidence supporting this statement.

Mr. Powell into the desert, instructing the others to turn up the car radio. *Id.* at 126. When Petitioner returned, according to Ramsey, he was alone "and he said that was loud. I asked him what was loud and he said it sounded like a rifle or something like that, I don't remember. And he said not to ask any more questions." *Id.* at 127-28.

Ramsey testified she, Hoover and Walton took the proceeds of the robbery and bought food. *Id.* at 128-29. During the next few hours, she said Petitioner made several statements about the homicide. In one of those statements, she quoted Petitioner as saying "he never seen a man pee in his pants before." *Id.* at 131.

On cross-examination, Ramsey acknowledged that, prior to their arrest, she and Hoover had discussed what they would do if they were arrested; she claimed that Hoover "just said to tell the truth." *Id.* at 157. She acknowledged that she entered into the plea agreement for her testimony only after a private meeting with her boyfriend Hoover, which was arranged by her attorney and the prosecutor. *Id.* at 202. Ramsey also admitted making several false statements (*Id.* at 148), including lies about "[p]retty much everything" in a statement to police shortly after the plea agreement was entered into. *Id.* at 194.

David Bilodeau testified that, late on the night of March 5, 1986, Petitioner came to his house and said "he had just shot someone and that he needed some dynamite" to destroy the stolen vehicle. Tr. 12/15a at 12-13. According to Bilodeau:

> [Petitioner] said they were sitting around drinking and he said the guy was wising off and he asked him a couple of times to knock it off and the guy didn't knock it off. So he just reached over and shot him.

Id. at 14. Bilodeau testified that Petitioner "told me he dragged [the body] . . . up underneath a tree." *Id.* at 15.[7] He also said

[7] On cross-examination, Bilodeau admitted that, in his original statement to the police, he had quoted Petitioner as saying "we

that, when he spoke with Petitioner, Petitioner seemed to him to be "in a daze . . . . I don't really know if he knew what he did." *Id.* at 49.

Bilodeau said he had "[m]aybe four or five" prior felony convictions (*Id.* at 50), and that federal charges were pending against him at the time he testified. *Id.* at 25. He denied that he was given any consideration for his testimony except for use immunity, but he acknowledged that the prosecutor who called him had assisted in obtaining his release from jail on traffic warrants and the return of money seized by police in a raid on his home. *Id.* at 38-42.

Two witnesses were called by the defense. One was Robert Hoover, who refused to answer questions, invoking the Fifth Amendment in response to every question after giving his name. Tr. 12/15p at 53. The other was Becky Bolanos, the younger sister of Petitioner's girlfriend, Theresa. Tr. 12/15p at 147. Becky was called to refute Ramsey's claim that the murder weapon belonged to Petitioner, and Hoover had no gun. Becky testified about a conversation she had overheard between Hoover, Ramsey and Petitioner, about two weeks before Petitioner's arrest. *Id.* at 151. In that conversation, she said Hoover and Ramsey had described how they had stolen a gun a few nights before "at a biker's party . . . ." *Id.* at 152.

The defense arguments to the jury focused principally on the credibility of the witnesses and their differing accounts of who actually shot Mr. Powell. Tr. 12/16 at 175. The prosecution's arguments, particularly on rebuttal, emphasized the irrelevance of this issue in light of the instructions on felony murder:

> [Q]uite frankly it doesn't matter legally whether he shot him or he pulled the trigger, whether Walton pulled the trigger or Hoover pulled the trigger or Ramsey pulled the trigger, it doesn't matter.

dragged him up a hill;" but he testified "it seems to me today that he said he dragged him up the hill." Tr. 12/15a at 27. Biolodeau finally said he "[c]ouldn't be positive" "[w]hether it was we or he." *Id.* at 30. He explained some of his difficulties in recall by saying his "mind was pretty foggy back then." *Id.* at 35.

Id. at 196.

> [I]f you find that the defendant acting together with Sharold Ramsey and Robert Hoover, committed or attempted to commit armed robbery and/or kidnapping, that's all they intended to do, they intended and attempted to commit and did commit armed robbery or kidnapping and a death results during the course of and commission of that offense, whether Mr. Walton or any of the other two accomplices involved intends that death or not, it is first degree murder.

Id. at 205; see also J.A. 37-40.

The trial court's instructions, which immediately followed these arguments, bore out the prosecution's position. They included definitions of both premeditated murder and felony murder committed in the course of a robbery or kidnapping. *Id.* at 218. The jury was given a verdict form which provided only for general verdicts of "guilty" or "not guilty" of first degree murder. *Id.* at 225.

In the course of their deliberations, the jurors sent out this question to the judge: "For a person to be guilty of felony murder, does he actually have to pull the trigger?" J.A. 43. The court answered that the jury should "review the felony murder instructions and the accomplice instructions." *Id.* The jury's general verdict of "guilty" followed. J.A. 44.

C. The Aggravation/Mitigation Hearing.

On January 26 and 27, 1987,[8] pursuant to Arizona law, Judge

[8] In the interim between the conclusion of Petitioner's trial and sentencing hearing, Robert Hoover was tried before Judge Meehan and convicted of first degree murder. Judge Meehan later sentenced Hoover to life imprisonment. *State* v. *Hoover*, Ariz. Supreme Court No. CR87-0025 AP (August 22, 1989).

Meehan convened an "aggravation mitigation hearing" without a jury. Tr. 1/26 at 232.

The prosecution argued at this hearing that the murder of Thomas Powell was accompanied by two aggravating circumstances: "one cruel and depraved and the other the act was committed for pecuniary gain." Its only witness at this phase of the case was Dr. Allen Jones, the medical examiner who conducted the autopsy on Mr. Powell's body. Dr. Jones's testimony elaborated on his conclusion that Mr. Powell had awakened from unconsciousness sometime after he was shot and then suffered additional injuries, dehydration, and exposure during several days in the desert before he died. *Id.* at 234-42. The trial court overruled the defense objections to this testimony saying it "certainly goes to cruelty under the aggravating circumstances factors . . . ." *Id.* at 232-33.

After Dr. Jones's testimony,[9] the court took up the prosecutor's objections to a defense attempt to call as a witness Larry Inman, the foreman of the jury which had convicted Petitioner. *Id.* at 248. Defense counsel made an offer of proof that Mr. Inman would testify the jury convicted Petitioner solely under the felony-murder rule, because it "never could decide on who pulled the trigger." *Id.* at 249. The prosecutor's objections to the proffer were sustained. *Id.* at 250.

The sole defense witness called in mitigation was Dr. David Barry Gurland, a psychiatrist. Tr. 1/27 at 260. Dr. Gurland said that his examination showed that Petitioner had a long history of drug abuse, which escalated around the time of this offense

[9] The prosecution was permitted to recall Dr. Jones the next morning, before the defense began its case. *Id.* at 252. This time, Dr. Jones testified he could not be certain whether or not Mr. Powell would have been conscious or unconscious immediately after the gunshot. *Id.* at 257. He also testified that death was not inevitable from the gunshot wound alone: "[d]epending on how soon after the shooting he would have received medical attention . . . it was a survivable wound." *Id.* at 254.

to "very regular[]" use of "alcohol, cocaine, amphetamines, these types of things . . . ." *Id.* at 265. Dr. Gurland testified that "those types of drug mixtures will certainly impair one's judgment," and that there was "some evidence that around this time there may very well have been some memory deficits or some blackout spells." *Id.* at 265. He also found Petitioner had a "passive-dependent personality" and

> tends to rely on things and people. He's not a leader. Tends to be more of a follower. Can probably be persuaded to act in certain ways to please others. That type of person.

Id. at 266. He connected Petitioner's drug usage to his "bizarre sexual background when he was a child."[10] He found "nothing that showed even in his previous criminal background that he was really of a violent nature." *Id.* at 267. On cross examination, Dr. Gurland said he agreed with the report of a Dr. Hinton, who had reported many of the same things, and concluded Petitioner was not legally insane under the M'Naghten standard. *Id.* at 275.

Defense counsel began his closing argument at this phase by reading off "factors that I think the Court can conclude from the evidence go to mitigation." *Id.* at 282. That specification included:

> the lack of flight and helping the officers find the body and cooperating. The mental state testified to by Dr. Gurland is the end result of a viscious [sic] set of circumstances . . . the sexual problems and difficulties and horror with his own mother . . . . Then I think there is substantial impair-

[10] This statement apparently referred to a Nebraska Department of Correctional Services Classification Study dated February 8, 1983, attached to the Presentence Report in this case. The study said that Petitioner reported he was sexually abused and severely physically beaten by his alcoholic mother between the ages of seven and thirteen. The study said the mother had refused to discuss this, so there was "no documentation" of it, except a social worker's report which contained an "implication that there may be some sexual problems with the mother and the offender." *Id.* at 3.

> ment shown at the time in question . . . . And I also think that there is evidence he did not do the shooting. The other mitigating factor that is important . . . is the age of the defendant.

Id. at 283-84. Counsel concluded by arguing against the State's claims of the existence of the statutory aggravating factors,[11] calling them "speculation." "To be a depraved, cruel person you have to know what was going on. And there is no indication that they knew." *Id.* at 285.

The prosecutor's argument focused on its claim that the murder was "cruel" within the meaning of the Arizona statute. It asked the court to envision the victim's experience during the "seven or eight or nine days that man is out in the desert," and "the things going through that man's mind as he was in that car." *Id.* at 287. The prosecutor also argued "[t]hat heinous and depraved is what [Walton] . . . does afterwards. I have never seen anybody pee in their pants before. Like this is an interesting, curious thing, this is how concerned he is." *Id.* at 291.

With regard to mitigation, the prosecutor argued that unless the defendant's age caused a "substantial impairment of judgment it is not a mitigating circumstance." *Id.* at 289.

> There are no mitigating factors. To the extent that the Court would consider there's any mitigating factors at all present, they are not substantial enough to call for leniency.

Id. at 292.

Immediately upon the completion of these arguments, Judge Meehan read into the record his written judgment.

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[11] At the close of the prosecution's case in aggravation, and in a written memorandum submitted prior to the hearing, defense counsel had argued that the "pecuniary gain" aggravating factor had not been established because "the killing was not done in furtherance of the robbery" (Tr. 1/27 at 259) and there was "no evidence of an overall plan to rob and murder." R. 126, p. 480.

> The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.
>
> The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.
>
> The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been significantly impaired but not so impaired as to constitute a defense to prosecution.
>
> The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the presentence report and all other mitigating circumstances as stated by your attorney on the record this date.
>
> The court finds the following aggravating circumstances. Number one, that you committed the offense in an extremely heinous, cruel or depraved manner.
>
> Number two, that the offense was committed for pecuniary gain.
>
> The Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.
>
> Therefore it is the sentence of the Court as to count one, first degree murder, that you be committed to the custody of the Arizona State Department of Corrections, from there to be put to death in the manner prescribed by law.

J.A. 56-57.

D. The Appeal.

The Supreme Court of Arizona affirmed Petitioner's convictions and sentences. J.A. 111. It relied on its previous decisions to reject a variety of arguments that the Arizona death sentencing statute was unconstitutional. J.A. 92.

The court also upheld the application of the "heinous, cruel or depraved" aggravating circumstance in Petitioner's case. J.A.

97-100. In so doing, it rejected the State's argument that Mr. Powell's "physical anguish from the wound, exposure, and conscious suffering in the desert" supported this circumstance, because "Powell's survival and longevity were neither reasonably foreseeable nor intended . . . ." J.A. 98. However, it found "ample evidence that Powell suffered substantial mental anguish prior to his death," pointing to evidence that "Powell suffered great mental anguish during the car ride when his fate was uncertain and his final march into the desert when his fate had become certain." J.A. 97, 98.[12] The court also found that "[s]ome circumstances suggest that the present defendant also committed the offense in a depraved manner." J.A. 99. In this regard, the court pointed to the defendant's alleged statement, testified to by Sharold Ramsey, that he'd "never seen a man pee in his pants before." *Id.* Emphasizing that "a finding of any one of those three factors suffices to constitute an aggravating circumstance", the court affirmed. J.A. 99-100.

Two Justices concurred, noting the conflicting evidence on whether Petitioner or Hoover did the shooting, and the doubtful credibility of all the witnesses on both sides. J.A. 112-113. They suggested that the jury's confusion in this case underscored the need for a verdict form setting forth separately the jury's finding of felony- or premeditated murder. J.A. 114-115.

SUMMARY OF ARGUMENT

1. The Arizona capital punishment scheme denies defendants on trial for their life the centuries-old right to have a jury determine the fact of their guilt of a capital offense.

Arizona can constitutionally delegate the sentencing decision in capital cases to a judge. But under the Sixth Amendment it cannot assign to the judge the distinct threshold determination whether a defendant has committed an act that

[12] It was in this regard that the Arizona court stated, with no evidentiary basis we can find, that Mr. Powell "begged the defendant not to kill him." *Id.*

subjects him to a potential capital sentence. That determination involves a function traditionally within the exclusive province of the jury: making findings of specific, statutorily defined facts, regarding issues of *actus reus* and *mens rea*, which state law requires to be proved by competent evidence beyond a reasonable doubt in order to render a defendant eligible for a qualitatively harsher punishment.

The right to jury trial has always been understood to encompass the right to a determination of the facts defined by law as prerequisites to criminal punishment, by jurors, not judges. Lord Coke's Latin phrasing of this rule—"Ad quaestionem facti non respondent Judices; ad questionem legis non respondent Juritores"—had been settled law for almost two centuries when the Sixth Amendment was written. That principle has underlain the most fundamental rules of criminal procedure, from the historic decision in *Bushell's Case* that jurors could not be imprisoned for contempt for "falsely" acquitting, to the modern prohibitions against conclusive presumptions and directed verdicts in criminal trials.

This Court's decisions have never departed from this bedrock historic principle. The holding in *Spaziano* v. *Florida* that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of" "the appropriate punishment to be imposed on an individual" explicitly distinguished between sentencing and determining the question of "guilt or innocence". *Hildwin* v. *Florida* merely followed *Spaziano* in a case in which all the facts necessary to make the defendant eligible for a death sentence had been found by a unanimous jury.

The Arizona Supreme Court has sustained its law on the theory that *Spaziano* authorizes any and all factual issues regarding a defendant's eligibility for a death sentence to be resolved by judges alone. That cannot be, unless *Spaziano* has eliminated "'[the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979).

2. The Arizona death sentencing statute differs from any this Court has previously examined. In every case in which an Arizona judge makes a finding of an "aggravating circumstance," the law requires that death be imposed unless the defendant establishes, by a preponderance of the evidence, "mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E). Three aspects of this procedure place it outside the Eighth Amendment bounds for capital sentencing schemes.

First, the Arizona law requires that claimed mitigating circumstances must be proved to exist, by a preponderance of the evidence, before they can be used to justify a sentence of less than death. This restricts the "sentencer's consideration of all mitigating evidence." *Mills* v. *Maryland*, 108 S.Ct. 1860, 1866 (1988).

Second, the statute creates a presumption that the death penalty should be imposed in every case where it can be. It does this although it also makes eligible for the death penalty a spectrum of homicides at least as broad as the Constitution permits. This reverses a historic judgment—evidenced by both the enactments of legislators and the actions of decisionmakers in capital cases throughout this country—that there should be "few cases in which [the death penalty] is imposed [and] . . . many cases in which it is not." *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion), *quoting Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Justice White).

Third, the Arizona statute is explicitly mandatory: it provides that the sentencer "shall" impose a death sentence wherever a single aggravating circumstance is found and the defendant fails to meet his statutory burden. This deprives the sentencer of the ability to determine in a given case "whether the death sentence is the appropriate sanction," *Sumner* v. *Shuman*, 483 U.S. 66, 78 (1987).

3. One of Arizona's "aggravating circumstances," sufficient to authorize a sentence of death, is a finding that "[t]he defendant committed the murder in an especially heinous, cruel, or depraved manner." In both its language and its application, this statutory provision is virtually identical to the Oklahoma provision struck down by this Court in *Maynard* v. *Cartwright*.

Like the Oklahoma statute, the vague terms of this provision are written in the disjunctive: a murder is a capital offense if the trial court simply finds that it was "depraved." Also like the Oklahoma court in *Maynard*, the Arizona Supreme Court has persistently defined the provision in "terms or phrases as prone to subjectivity and ambiguity as those they were meant to define" *Adamson* v. *Ricketts*, 865 F.2d 1011, 1031 (9th Cir. 1988) (en banc). Similarly like its Oklahoma counterpart, in reviewing this finding the Arizona "court appears to rely on whatever events are presented to it" and "to review the record for any actions or events that it believes to be especially heinous, cruel or depraved." *Id.* at 865 F.2d 1036.

The application of the "heinous, cruel, or depraved" factor in this case exemplifies its standardlessness. The trial court's sentencing order simply recited the statutory language, without specifying which statutory adjectives it found applicable to Petitioner's crime. The Arizona Supreme Court rejected the prosecution's principal argument in defense of the trial court's determination but upheld the finding of this factor, by pointing to facts which do not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983), in the State of Arizona. In Arizona, as in Oklahoma, this part of the statute has failed to control the arbitrary imposition of death.

I. ARIZONA LAW VIOLATES THE SIXTH AMENDMENT BY DENYING CAPITAL DEFENDANTS THE RIGHT TO "TRIAL, BY . . . JURY" ON THE FACTUAL ISSUES GOVERNING THEIR ELIGIBILITY FOR A SENTENCE OF DEATH.

Under Arizona law, the death penalty may be imposed only for the crime of first degree murder, accompanied by

"aggravating circumstances." The statutory definition of first degree murder is a broad one, encompassing all premeditated killings and many types of unintentional felony-murders. A.R.S § 13-1105. Without more, a conviction of first degree murder carries a life sentence, with parole eligibility in 25 years. A.R.S. § 13-703(A). However, if the prosecution additionally proves, beyond a reasonable doubt, that a first degree murder was accompanied by one or more of nine statutorily defined "aggravating circumstances," the range of permissible punishments is expanded to included execution by lethal gas. A.R.S. § 13-703(E).

In some respects, this statutory system resembles those enacted by several other states since *Furman* v. *Georgia*. However, in one crucial aspect it differs from all post-Furman laws this Court has examined: the defendant's eligibility to be considered for a death sentence, which depends on proof of an "aggravating circumstance," is decided by the trial judge alone, without any input from a jury. That encroachment on the right to trial by jury is unique to this statute and three other state capital punishment laws enacted since *Furman*.[13]

A. The Historic Province of the Jury in Criminal Trials.

The right to jury trial is perhaps the most deeply revered and distinctive feature of the system of justice that America inherited from its British traditions.[14] Predating the Constitution

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[13] A fourth similar law, enacted by the state of Oregon, was struck down by that state's Supreme Court for this reason. *State* v. *Quinn*, 290 Or. 383, 623 P.2d 630 (1981).

[14] References in the Constitutions of Clarendon (1164) and the Magna Charta (1215) attest to the age of this institution. Wells, *The Origin of the Petty Jury*, 27 LAW QUAR. REV. 347 (1911). By the late 1500's, the jury was accepted in England as a fundamental check on the power of the monarchy. See *Isaack* v. *Clark*, 1 Rolle 126, 135 (1613).

> Mr. Hallam, in his Constitutional History of England . . . said that as early as the reign of Henry VII one of the essential checks upon royal power was that 'the fact of guilt or innocence on a criminal charge was determined in a public court . . . by a jury of twelve men. . . .'

Maxwell v. *Dow*, 176 U.S. 581, 609 (1900) (dissenting opinion of Mr. Justice Harlan).

by hundreds of years, the jury right was "peculiarly dear and inestimable" to the English colonists, who "established and cherished it as one of their dearest privileges, and in every enumeration of their rights and immunities, it takes a conspicuous place." J. PROFFATT, A TREATISE ON TRIAL BY JURY 120-121 (1877).

The British Crown's "depriv[ation] . . . in many cases, of the right of Trial by Jury" was an enumerated complaint of the Declaration of Independence.[15] So determined were the framers of the Constitution to prevent the recurrence of such deprivations in criminal cases, they took the unique step of writing two Clauses into the Constitution—one in Article III, Section 2, the other in the Sixth Amendment—setting forth that guarantee. The constitution of every state includes at least one similar passage. 2 STORY, COMMENTARIES ON THE CONSTITUTION, §§ 1779, 1780 (5th ed. 1891); HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 16-17 (1951).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be

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[15] See PROFFATT, *supra*, at 121: "So dearly was [the jury right] . . . esteemed, and in almost every instance when popular action organized to check the encroachments of power, and when the grievances and abuses suffered were enumerated, we find a denial of this right loudly and conspicuously complained of, and in the redress demanded its integrity and guarantee are insisted on."

> tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. *Louisiana*, 391 U.S. 145, 155-156 (1968).

From its earliest recognition in the law of England, the essential power and responsibility delegated to juries has been "to enquire and know upon their oaths, if the fact be so . . . ." Fortescue, De Laudibus Legum Angliae (1468), reprinted in CARPENTER AND STAFFORD, READINGS IN EARLY LEGAL INSTITUTIONS 347 (1932).

> For if the Judge, from the Evidence, shall by his own Judgment first resolve upon any Tryal what the fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury penalty to find accordingly, what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all? . . . [I]n these cases the Jury, and not the Judge, resolve and find what the fact is.

Bushell's Case, 6 Howard's State Trials 999, Vaughn's Rep. 135, 143-44 (1670).

> [T]he first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths."

Maxwell v. *Dow, supra*, 176 U.S. at 609 (dissenting opinion of Mr. Justice Harlan).

> It may safely be said that at the time of the American Revolution the general principle was well established in English law that 'juries must answer to questions of fact

> and judges to questions of law. This is the fundamental maxim acknowledged by the Constitution.'

Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 677 (1918).[16]

> That Decantum in our Books, Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores literally taken is true . . . .

Bushell's Case, supra, Vaughn's Rep. at 149.

> The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must in all cases determine the value and effect of evidence . . . . The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect.

FORSYTH, HISTORY OF TRIAL BY JURY 282 (1852). Justice Story was thus on firm ground, when he called it "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." *United States* v. *Battiste*, 2 Sumner 240, 243 (1835).

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[16] *See also* BLACKSTONE'S COMMENTARIES §§ 349-350 (Lewis ed. 1897):

> [T]he founders of the English law have with excellent forecast contrived . . . that *the truth of every accusation* . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and iniolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . .

(emphasis added). *Rex* v. *Poole*, Cases Tempore Hardwicke 23, 27 (1734), *quoted in Sparf* v. *United States*, 156 U.S. 51, 94 (1895):

> [I]t is of the greatest consequence to the law of England, and to the subject, that these pwers of the judge and jury be kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

The basic premise that the factfinding function is assigned exclusively to the jury underlies some of the most fundamental rules of our criminal justice system. It was, for example, the foundation of the historic decision in *Bushell's Case* that jurors could not be imprisoned for "falsely" acquitting: "For if it be demanded, What is the Fact? The Judge cannot answer it . . . ." Vaughn's Rep. at 149. It also, as Justice Scalia recently explained, forms the bedrock upon which is built a whole panoply of rules respecting the relative powers and duties of judge and jury:

> The Court has disapproved the use of mandatory conclusive presumptions not merely because it "'conflict[s] with the overriding presumption of innocence with which the law endows the accused,'" *Sandstrom* v. *Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39, (1979) (quoting *Morissette* v. *United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed.2d 288 (1952)), but also because it "'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 99 S.Ct. at 2459 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978)). . . . A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. See *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977). That is also why in *Carpenters* v. *United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947), the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy—regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella v. *California*, 109 S.Ct. 2419, 2421-22 (1989) (concurring opinion).[17] The unchallenged assumption that "the

[17] *See also, e.g. Crane* v. *Kentucky*, 476 U.S. 683, 689 (1986) (jury must be allowed to hear evidence regarding the circumstances of a confession because of their "relevance to the ultimate factual issue of . . . guilt or innocence"); *Patton* v. *United States*, 281 U.S. 276, 312 (1930) ("the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions" that waiver requires consent of the government and the sanction of the court).

truth-finding task [is] assigned solely to juries in criminal cases" (*id.* at 2420) is a thread which runs through centuries of decisions of the courts of England, of this Court,[18] and the lower courts of the United States.[19]

B. This Court's Decisions Regarding Sentencing By Judges in Capital Cases.

In its Response to the Petition here and in its arguments below, Respondent has never addressed this history. Nor has it explained to what issues the Sixth Amendment jury trial right applies, if not the facts of the crime that make a defendant eligible to be considered for a sentence of death. Instead, it has based its defense of the Arizona statute exclusively upon this Court's decisions upholding Florida's death penalty statute, on its face and as applied in *Proffitt* v. *Florida*, 428 U.S. 242 (1976);

[18] *See also, e.g., Press Enterprise* v. *Superior Court*, 464 U.S. 501, 505 (1984) ("The trial of a criminal case places the factfinding function in a jury . . . ."); *Morrissette* v. *United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."); *Sparf* v. *United States*, *supra*, 156 U.S. at 79 ("the proper province and duty of the jury [is] to decide all questions of fact"); *Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, J.) ("on questions of fact, it is the province of the jury . . . ."

[19] *See, e.g., United States* v. *Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987); *United States* v. *Voss*, 787 F.2d 393, 398 (8th Cir. 1986); *United States* v. *England*, 347 F.2d 425, 430 (7th Cir. 1965); *State* v. *Powers*, 154 Ariz. 291, 742 P.2d 792 (1987); *State* v. *Nass*, 76 Wa.2d 368, 456 P.2d 347, 348 (1969); *People* v. *Feagley*, 121 Cal.Rptr. 509, 535 P.2d 373 (1975); *State* v. *Wedge*, 293 Or. 598, 652 P.2d 773, 778 (1982).

Spaziano v. *Florida*, 468 U.S. 447 (1984); and *Hildwin* v. *Florida*, 109 S.Ct. 2055 (1989).

On its face, Florida's statute differs significantly from Arizona's. Florida judges make the ultimate sentencing decision after receiving a jury sentencing recommendation which they may override only in limited circumstances. *Spaziano* v. *Florida*, *supra*, 468 U.S. at 451; *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975). Although the jury's recommendation and the judge's decision are guided by a list of statutory "aggravating circumstances" which resembles Arizona's similarly-denominated list, the statutory function of these aggravating circumstances is significantly different in the two jurisdictions. Under the Florida statute, the determination of "whether sufficient aggravating circumstances exist" is simply one of the "considerations" in the ultimate determination of "whether the defendant should be sentenced to life or death." Fla. Stat. Ann. § 921.141(2). In Arizona, a finding of "one or more of the aggravating circumstances enumerated in" the law is the statutory prerequisite for a death sentence—and it mandates such a sentence unless there are mitigating circumstances "sufficiently substantial to call for leniency." A.R.S. § 13-703(E).

The context in which the Court addressed the constitutionality of the Florida procedures in *Proffitt*, *Spaziano*, and *Hildwin* underscored these differences. In *Proffitt*, the plurality simply noted, in discussing the Eighth Amendment issue before it, that it had "never suggested that jury sentencing is constitutionally required." 428 U.S. at 252. In *Spaziano*, the Court upheld Florida's practice of allowing judges to "override" life-sentence recommendations by juries—once again viewing the issue as whether the Constitution required that juries be given the ultimate power to make the *sentencing* judgment, 468 U.S. at 461-65, and concluding "that there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed . . . ." *Id.* at 465. Throughout this discussion, the *Spaziano* opinion carefully disinguished between "the capital sentencing decision" and the

"trial on guilt or innocence." *Id.* at 461-65.[20] The *per curiam* decision in *Hildwin* simply elaborated on *Spaziano:*

> If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, . . . it follows that it does not forbid the judge from making the written findings that authorize a death sentence *when the jury unanimously recommends a death sentence.*

109 S.Ct. at 2056 (emphasis added).

None of these cases involved the stark Sixth Amendment problem presented here. As the Court of Appeals for the Ninth Circuit has observed:

> Never challenging the fundamental principle that criminal defendants are entitled to a jury trial, *see Duncan*, 391 U.S. at 156, 88 S.Ct. at 1451, the Court's examination in *Spaziano* was limited to the constitutionality of judicial "sentencing" and evaluation of "the appropriate punishment to be imposed." 468 U.S. at 458-59, 104 S.Ct. at 3160-61. . . . Sentencing, or the ultimate determination of an appropriate penalty, involves the *weighing* of factors. Such weighing is completely distinct from threshold findings of whether requisite elements even exist from which the trier-of-fact draws conclusions on guilt or innocence.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1028-9. This Court has similarly emphasized the distinction between finding the facts that make a defendant eligible for the death penalty and assessing the factors that bear upon the ultimate sentencing choice.

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[20] To a significant extent, the Court's decision in *Spaziano* was guided by concessions of counsel in that case. *See id.* at 457-461. Counsel's arguments never focused the issue in Sixth Amendment terms. The certiorari petition in *Spaziano* raised the claim under the Fifth and Seventh Amendments. *Spaziano* v. *Florida*, No. 83-5596, Petition for Certiorari at i. The arguments made in the petitioner's brief in that case all derived from the Eighth Amendment. *Id.*, Brief of Petitioner at 25-54.

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

California v. *Ramos*, 463 U.S. 992, 1008 (1983).[21]

All that this Court's cases concerning the Florida statute did or could hold was that judges may make the final sentencing judgment in capital cases, even under statutes which require the sentencer to consider specified aggravating and mitigating circumstances among the "myriad of factors [that] . . . determine whether death is the appropriate punishment." That is very different from the question presented here: whether the Sixth Amendment permits judges alone to resolve the decisive questions of fact that establish that "the defendant falls within the legislatively defined category of persons eligible for the death penalty."

C. The Continued Vitality of the Sixth Amendment.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court upheld a statute which increased the mandatory minimum sentence if a felony involved the visible use of a firearm and which left the factual question of firearm use to the sentencing judge under a preponderance-of-the-evidence standard of proof. The Court's analysis in *McMillan* first made clear that the statutory label placed on the factual issue was not dispositive of the Sixth Amendment's application. 477 U.S. at 87-88.[22] It stressed that the Pennsylvania law

> neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.

Id. The Court acknowledged that the case might be different "if a finding of visible possession exposed [a defendant] . . . to greater or additional punishment, . . . but it does not." *Id.* at 88.[23] And the Court concluded by acknowledging an "inability to lay down any 'bright line' test in this area." *Id.* at 2419.

This case requires the drawing of a line which, if not bright, is at least firm, lest legislatures be left free to transfer the historic Sixth Amendment factfinding function of the jury to judges. In every conceivable respect but name Arizona's "aggravating circumstances" are the kind of facts traditionally left to juries—facts which spell out the difference between conviction of a greater or a lesser crime. Unlike the finding

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[21] "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," *California* v. *Brown*, 479 U.S. 538, 545 (1987) (concurring opinion of Justice O'Connor), "largely a moral judgment of the defendant's desert," *Caldwell* v. *Mississippi*, 472 U.S. 320, 340 n.7 (1985).

[22] Justice Stevens' dissenting opinion was even more explicit on this point.

> [I]t would demean the Constitution itself . . . if [constitutional protections] . . . could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the Legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed the victim "during the commission of the offense."

477 U.S. at 102.

[23] The Court in *McMillan* distinguished *Specht* v. *Patterson*, 386 U.S. 605 (1967), on this ground, noting that in *Specht* the post-trial judicial findings increased the "maximum penalty of ten years . . . to an indefinite term to and including life imprisonment. . . ." *Id.*

made by Pennsylvania judges in *McMillan*, the finding of an "aggravating circumstance" under the Arizona statute dramatically "alter[s] the maximum penalty for the crime committed," exposing a defendant to a "greater or additional punishment": the qualitatively more severe punishment of death.[24]

Also unlike the Pennsylvania statute considered in *McMillan*, Arizona law itself provides that "aggravating circumstances" must be proved by competent evidence and found beyond a reasonable doubt. A.R.S. § 13-703(C); *State* v. *Jordan*, 126 Ariz. 283, 614 P.2d 825, 828 *cert. denied*, 449 U.S. 986 (1980). The aggravating circumstances are exclusively delineated by the Arizona death penalty statute, and a finding of even one of those circumstances not only makes the defendant eligible for a death sentence, but also shifts the burden to the defendant to establish "mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(D). Thus, to the extent that the scope of the Sixth Amendment is "'dependent on how a State defines the offense that is charged in any given case,'" *McMillan* v. *Pennsylvania*, 477 U.S. at 85, quoting *Patterson* v. *New York*, 432 U.S. 197, 211 n.12 (1977), the State of Arizona has defined the offense of capital murder as first degree murder accompanied by an aggravating circumstance, in everything but name.

> While the statute's nomenclature ("aggravating circumstances") suggests they are mere factors guiding the judge in his or her determination of the appropriate penalty, all other indicators confirm that aggravating circumstances are additional *elements* necessary for a finding that a defendant is guilty of the distinctive offense of *capital murder. Finding aggravating circumstances results in the only crime in Arizona for which a defendant may receive a death sentence.*

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[24] "Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Beck* v. *Alabama*, 447 U.S. 625, 638 n.13 (1980), *quoting Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976).

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1026.

In addition, most Arizona "aggravating circumstances"—including both of those found in this case—are substantively, as well as structurally, equivalent to the kind of factual determinations traditionally made by juries in finding the elements of a criminal offense: they encompass issues of *actus reus* and *mens rea*. *See Knapp* v. *Cardwell*, 667 F.2d 1253, 1267 (9th Cir. 1982), *cert. denied*, 459 U.S. 1055 (1982) (Adams, J., concurring). It has always been axiomatic that "[w]here the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury." *Morrissette* v. *United States*, *supra*, 342 U.S. at 274. As the Supreme Court of Oregon noted—striking down that state's former death penalty statute because it denied the right to jury trial—there is no more basic conception of an "element of the offense" within the historic province of the jury than those facts which "go to the criminal acts for which the defendant is to be punished" or bear on "the existence of the requisite culpable mental state with which the crime was committed . . . ." *State* v. *Quinn*, *supra*, 623 P.2d at 644. To allow states to withdraw such questions of fact from a jury would be to abandon any limit on the state's power to "redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975). And if there is no such limit, it is hard to imagine what functions the Sixth Amendment reserves to the jury, and "what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?" *Bushell's Case*, *supra*, Vaughn Rep. at 143.

II. THE ARIZONA STATUTE'S MANDATORY PRESUMPTIONS OF DEATH PRECLUDE THE INDIVIDUALIZED SENTENCING REQUIRED BY THE EIGHTH AMENDMENT.

This Court has "reached unanimity on the constitutional significance of individualized sentencing in capital cases . . . ." *Sumner* v. *Shuman*, 483 U.S. 66, 85 (1987); *see Hitchcock* v.

Dugger, 481 U.S. 393 (1987); *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). It has accepted no substitute for the constitutionally requisite "determin[ation] whether the death penalty is appropriate in any particular case." 483 U.S. at 78; *see Woodson* v. *North Carolina*, 428 U.S. 280, 304-5 (1976). It has held that in all capital cases "'the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Id.* at 76 n.5, quoting *California* v. *Brown*, *supra*, 479 U.S. 538, 545 (1987) (concurring opinion of Justice O'Connor) (original emphasis); *see Penry* v. *Lynaugh*, 109 S.Ct. 2934 (1989).

The Arizona statute at issue here replaces this individualized determination and moral response with a rigid statutory formula. Under the formula, unless the defendant meets the dual burden of establishing that particular mitigating circumstances exist and persuading the trial judge that those circumstances are "sufficiently substantial to call for leniency," the death penalty is mandatory. A.R.S. § 13-703(C), (E); *State* v. *Jordan*, 137 Ariz. 504, 672 P.2d 169, 173 (1983). Three features of the Arizona procedure interact to make it an inadequate vehicle for fulfilling the state's constitutional obligation to allow its capital sentencers "to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976).

A. The Burden of Proving Mitigating Circumstances.

The Arizona statute's imposition on the defendant of the burden to establish, by a preponderance of the evidence, "the existence" of mitigating circumstances, plainly "require[s] defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." *Lockett* v. *Ohio*, 438 U.S. 583, 608 n.16 (1978). Since reserving judgment on that practice in *Lockett*, the Court has never countenanced such a law. Rather, in the wake of *Lockett*, the Court has invalidated a variety of state-imposed restrictions upon the consideration of a capital defendant's evidence in mitigation.

> It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982), *quoting Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)(emphasis in original). See *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider *or be precluded from considering* 'any relevant mitigating evidence'" is equally "well established." *Id.* (emphasis added), quoting *Eddings*, 455 U.S., at 114.

Mills v. *Maryland*, 108 S.Ct. 1860, 1865 (1988).[25] Arizona law does not allow mitigating evidence concerning aspects of a defendant's character and offense to be weighed in the balance of life and death unless that evidence establishes the existence of some identifiable "mitigating circumstance" by a preponderance of the evidence.

> [T]he Arizona courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1041. Doubts raised by evidence proffered in mitigation cannot be "resolved in favor of the accused." *Mills* v. *Maryland*, *supra*, 108 S.Ct. at 1866-67, quoting *Andres* v. *United States*, 333 U.S. 740, 752 (1948). A sentencer who, like Petitioner's trial judge, acknowledges that the defendant's mental capacity "may have been

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[25] *Accord*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982) ("neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence"); *McCleskey* v. *Kemp*, 481 U.S. 279, 304 (1987) ("[T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence."); *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2951 (the sentencer "must be able to consider and give effect to any mitigating evidence").

significantly impaired" at the time of the crime (see *supra* page 13)but who cannot resolve this question one way or the other because of the notoriously refractory nature of psychiatric evidence (see *Addington* v. *Texas*, 441 U.S. 418, 429-30 (1979)) —is forbidden to take the defendant's possible impairment into account as a reason not to impose a death sentence, even in a case where all of the other factors in mitigation and aggravation are evenly balanced. Nor may the sentencer give "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), if these cannot be fairly characterized as mitigating circumstances. For example, the fact—conceded by the Arizona Supreme Court—that Petitioner Walton did not foresee Mr. Powell's ordeal in the desert, could not be considered in any way as reducing the gravity of the "heinous, cruel or depraved" aggravating circumstance, once the latter circumstance was technically established on other grounds.[26] Moreover, as Justice Marshall explained, in discussing a similar provision of Maryland law:

> [T]he mitigating factors set out in the statute are not matters of historical fact—they are matters of legal and moral judgment. These factors do not "exist," and thus, unlike matters of historical fact, they are not easily proved or disproved. Each one rests on evidence that easily might

[26] The Arizona Supreme Court examined Mr. Powell's physical suffering only for the purpose of determining whether it made out the "heinous, cruel or depraved" aggravating circumstance. The court held that it did not, but that the circumstance was established by Mr. Powell's presumable fear in anticipation of death. See *supra* page 13-14. Once this (or any) aggravating circumstance was established by *any* evidence, it compelled a death sentence in the absence of a finding of some mitigating circumstance by a preponderance of the evidence; and the fact that the *degree* of the aggravation was or was not extreme could not be considered. Lacking separate identity as a mitigating circumstance, the unforeseeability of Mr. Powell's suffering became entirely irrelevant to the appropriateness of a capital sentence under Arizona's mechanistic sentencing formula.

> influence the conclusion that death is proper, even if that evidence does not conclusively *prove* the statutory mitigating factor. For example, the sentencer might be influenced by evidence tending to demonstrate that the defendant acted under substantial duress, or it might even find that the defendant acted under moderate duress. Yet it would not necessarily find that the defendant had proved that he "acted under substantial duress." Similarly, the sentencer might find that the defendant was of impaired mental capacity, but it might not believe that the impairment was substantial at the time of death. Under the statute, the sentencer would find that the defendant had not proved these mitigating factors. As a result, *the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof*, because the statute permits consideration only of the factors proved by a preponderance of the evidence. To preclude the sentencer from considering such potentially influential evidence—as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor "exists" by a preponderance of the evidence—is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings*. Such a result can only enhance "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605
> . . . .

Stebbing v. *Maryland*, 469 U.S. 900, 902-03 (1984) (opinion dissenting from denial of certiorari) (original emphasis).

B. The Statutory Presumption in Favor of Death.

Not only must Arizona capital defendants establish that particular mitigating circumstances exist, but they must show that these circumstances are "sufficiently substantial to call for leniency." A.R.S. § 13-703(E). This statutory language tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless—as the Arizona Supreme Court put it in Petitioner's case—there are "outweighing mitigating factors." J.A. 94. In *Adamson* v. *Ricketts*, the Ninth Circuit succinctly described this system:

> Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). . . . The relevant clause in the statute—'sufficiently substantial to call for leniency'—thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

865 F.2d at 1041-2 (footnotes omitted). As Judge Hill wrote for a panel of the Eleventh Circuit, holding invalid a similar "presumption of death" in a jury instruction in a Florida case:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. [citations omitted]. When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.

Jackson v. *Dugger*, 837 F.2d 1469, 1474 (11th Cir.), *cert. denied*, 108 S.Ct. 2005 (1988). Whether given by instruction or statute, to a jury or a judge, such a presumption "is so skewed in favor of death that it fails to channel . . . sentencing discretion appropriately." *Id.*

This statutory thumb on the scales of justice in Arizona capital cases adds to the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, *supra*, 438 U.S. at 605 (plurality opinion). It does so in a manner inconsistent with the "evolving standards of procedural fairness," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), in the administration of capital punishment in this country. *See Woodson* v. *North Carolina*, *supra*, 428 U.S. at 289-301.

> "This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ."

Id. at 356-7, quoting *Williams* v. *New York*, 337 U.S. 241, 247-48 (1949). This Court's experience, reviewing vast numbers of homicide cases, has led it to assume that there will be "'few cases in which [the death penalty] is imposed [and] . . . many cases in which it is not.'" *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion), quoting *Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Justice White). The actions of decisionmakers in death penalty cases across the country, reflecting contemporary standards, confirm this as a longstanding national pattern.[27] Yet the Arizona statute presumes that the death penalty should be imposed on every defendant eligible to receive it—at the same time making death-eligible a spectrum of homicides at least as broad as the Constitution allows. See *Tison* v. *Arizona*, 481 U.S. 137 (1987). Only a handful of other states' capital punishment statutes contain such a sweeping, mandatory presumption in favor of death. We have summarized all the laws of which we are aware, in Appendix B to this Brief. As it shows, although a number of state laws contain a balancing formula which, in effect, creates a presumption in favor of death, only eight (including Arizona) do so in a context where a negative answer *requires* a death sentence if any aggravation is shown. And the laws of only two of those states—Arizona and Maryland—simultaneously preclude the weighing of mitigating evidence unless it establishes some particular mitigating circumstance by a "preponderance of the evidence."

We submit in the preceding and following subparts of this section that Arizona's restriction on the weighing of mitigation and the mandatory form of its law separately render it invalid under the Eighth Amendment precedents. Combined with the presumption of death, those features of this law "place[] the risk of error squarely on the defendant's shoulders." *Stebbing* v. *Maryland*, *supra*, 469 U.S. at 907 (Justice Marshall, dis-

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[27] *See, e.g., BEDAU, THE DEATH PENALTY IN AMERICA 29-64 (3d ed. 1982); NANKELL & HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 2 (1987).*

senting from denial of certiorari). With an interest of transcending value at stake, a capital defendant cannot be constitutionally made to shoulder "such an excruciating burden." *Id.*

C. The Removal of Sentencing Discretion.

The Arizona statute is explicitly mandatory: it provides that the sentencer "shall" impose a death sentence whenever a single aggravating circumstance is found and the defendant fails to meet his statutory burdens of proof. A.R.S. § 13-703(E). The Arizona Supreme Court has repeatedly confirmed that

> [w]here one or more statutory aggravating circumstance is found, and no mitigation exists, the statute *requires* the death penalty.

State v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13 *cert. denied*, 461 U.S. 971 (1983) (emphasis added).

> [U]nder A.R.S. § 13-703(E), the trial court *must* impose a sentence of death if it finds the existence of one statutory aggravating factor and does not find the existence of any mitigating factor (or one or more mitigating circumstances substantial enough to call for leniency).

State v. *Beaty*, 158 Ariz. 232, 762 P.2d 519, 533-34 (1988) *cert. denied*, 109 S.Ct. 3200 (1989) (original emphasis).

There is no place in Arizona law for the sentencer to inquire whether a given crime was sufficiently aggravated to warrant this presumption of death; the same presumption applies if there is one aggravating factor or many, and regardless of the fact that the particular aggravating circumstance "may not be sufficient to render death an appropriate sentence," *Sumner* v. *Shuman*, *supra*, 483 U.S. at 80. The *appropriateness* of the death penalty for an individual offender is simply not in issue. The Arizona Supreme Court has made this clear:

> A death sentence is thus required *regardless of the trial court's belief that a life sentence is appropriate.*

State v. *Beaty*, *supra*, 762 P.2d at 533-34. (emphasis added). The statute plainly and completely "removes the sentencing judge's discretion . . . ." *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1042-3.

This offends the clearest principles this Court has set down since *Woodson* v. *North Carolina*. As Justice Stevens noted in reference to a much less rigid statutory scheme than this one:

> [The sentencer] might answer both of [the statutory] . . . questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "'death is the appropriate punishment in a specific case.'" *Lockett* [v. *Ohio*], *supra*, [438 U.S.] at 601 (plurality opinion), quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Pinch v. *North Carolina*, 459 U.S. 1056, 1057 (1982) (opinion respecting denial of certiorari).

Since those comments were made, the constitutional requirement of an "individualized assessment of the appropriateness of the death penalty" has been reiterated time and again. *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2946.[28] That is not what this law allows.

> While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the

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[28] *See also, e.g.*, *Sumner* v. *Shuman*, *supra*, 483 U.S. at 73-76; *Franklin* v. *Lynaugh*, 108 S.Ct. 2320, 2332-33 (1988) (concurring opinion of Justice O'Connor); *McCleskey* v. *Kemp*, *supra*, 481 U.S. at 310 n.32; *Booth* v. *Maryland*, 482 U.S. 496, 502 (1987); *Baldwin* v. *Alabama*, 472 U.S. 372, 380 (1985); *Caldwell* v. *Mississippi*, *supra*, 472 U.S. at 330-31.

> mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence . . . .

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1043 (footnotes omitted). As the Arizona Supreme Court has itself written, "[t]he statute takes the human element out of the imposition of the death penalty." *State* v. *Beaty*, *supra*, 762 P.2d at 534.

If the Eighth Amendment requires procedures which insure "that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence," *Penry* v. *Lynaugh*, 109 S.Ct. 2947, quoting *Woodson* v. *North Carolina*, *supra*, 428 U.S. at 304-05, it cannot permit a process that so inflexibly "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 428 U,S. 304.

D. The Application of the Statute in this Case.

Petitioner's death sentence illustrates the mechanistic operation of Arizona law.

Bluntly stated, this was a borderline capital case. We do not denigrate its seriousness. But as capital cases go—in Arizona and elsewhere—Petitioner's crime was relatively unaggravated. There was mitigating evidence—a 20-year-old defendant, a history of drug abuse and sexual abuse as a child, a confession, expressions of remorse—but it was less than overwhelming, and some of it was disputed. See *supra* pages 10-12. On such an equivocal record, the trial court's imposition of a death sentence was driven by the Arizona statutory formula.

Once the court found a single aggravating circumstance, the burden automatically shifted to the defense. The sentencing judge "considered" mitigation only within this statutory framework. J.A. 56. He acknowledged that one statutory mitigating circumstance "may have" existed but he made no finding that that factor or any others did exist. *Id.* simply concluded there were "no mitigating circumstances sufficiently substantial to call for leniency" and "[t]herefore" imposed the sentence of death. J.A. 57.

Nowhere did the court state that death was the appropriate punishment for Jeffrey Walton's crime. Nowhere did it express any judgment on "whether his "disadvantaged background, . . . emotional and mental problems [made him] . . . less culpable . . . ." *Penry* v. *Lynaugh*, *supra*, 109 S.Ct. at 2947. It simply plugged him into a formula, and the readout said "death." It had no power or discretion to do otherwise.

This was not a process "humane and sensible to the uniqueness of the individual." *Eddings* v. *Oklahoma*, 455 U.S. at 110. In an effort to achieve consistency in death sentencing, the Arizona statute goes too far; "by ignoring individual differences" it produces "a false consistency." *Id.* at 112. Petitioner's sentence, imposed under that statute, violates the Eighth Amendment.

III. THE APPLICATION OF ARIZONA'S "HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE VIOLATED THE EIGHTH AMENDMENT PRINCIPLES OF *GODFREY* v. *GEORGIA* AND *MAYNARD* v. *CARTWRIGHT*.

A "central tenet of Eighth Amendment law" is that capital punishment statutes must provide a "principled means . . . to distinguish those that received the penalty from those that did not." *Maynard* v. *Cartwright*, 108 S.Ct. 1853, 1858 (1988). In *Maynard*, the Court applied this rule to hold invalid Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance, as construed and applied by the Oklahoma courts.

Petitioner's death sentence followed an almost identical finding that his crime was "especially heinous, cruel or depraved."

J.A. 56. After an exhaustive examination of the language and history of this Arizona aggravating factor in *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1029-1039, the Ninth Circuit has found it indistinguishable in all respects from the Oklahoma law at issue in *Maynard*.[29] Arizona's open-ended interpretation and irregular application of the provision—both before *Adamson* and since—make this conclusion inescapable.[30]

A. The Arizona Statutory Language Places No Restraint on the Sentencer's Decision.

Arizona, like Oklahoma, has defined its catchall statutory aggravating circumstance in impossibly vague language. The terms of the statutes are nearly identical. Arizona uses the phrase "especially heinous, cruel or depraved." A.R.S. § 13-703(F)(6). Oklahoma used the phrase "especially heinous, atrocious, or cruel." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859. As this Court noted, "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id.*

Like the Oklahoma courts, the Arizona courts have given a disjunctive reading to their statute; "a finding of any one of those three factors suffices to constitute an aggravating circumstance. *State* v. *Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984)." J.A. 99. Accordingly, a defendant qualifies

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[29] The Arizona Supreme Court has discussed *Maynard* only once, in *State* v. *Vickers*, 159 Ariz. 532, 768 P.2d 1177 (1989). In that discussion, it simply said: "We believe we have sufficientnly defined the terms 'heinous, cruel and depraved' to prevent the sentencing judge from having unfettered discretion. These terms as applied by the Arizona courts are not void for vagueness." 768 P.2d at 1189.

[30] The same conclusion was reached, well before *Adamson*, by the leading commentator in this area, whose analysis of Oklahoma's state law was heavily drawn upon by the Court of Appeals in *Maynard*. Rosen, *The 'Especially Heinous' Aggravating Circumstance in Capital Cases: The Standardless Standard*, 64 N.C.L.Rev. 941, 968-69 (1986) [hereinafter "Rosen"].

for death under this provision if the trial judge believes that his crime was "especially heinous" or "especially depraved." Surely, "[a] person of ordinary sensibility could fairly characterize almost every murder" in those terms. *Godfrey* v. *Georgia*, 446 U.S. 420, 428-29 (1980).

The Arizona Supreme Court has added to the possibilities for arbitrary application of the "heinous, cruel or depraved" circumstance by placing the following gloss on the statutory language:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic. depraved: marked by debasement, corruption, perversion or deterioration.

State v. *Knapp*, 114 Ariz. 531, 562 P.2d 704, 716 (1977), *cert. denied*, 435 U.S. 908 (1978). As the cases have multiplied in which sentencing judges have found this factor, so have the variety of equally vague phrases used by the Arizona Supreme Court to elaborate it. *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1032. This has increased, not decreased, the breadth of the factor and the uncertainty surrounding its meaning. As the Tenth Circuit said with regard to an almost identical state court gloss on the Oklahoma statute, "[v]ague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright* v. *Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc).

> To define depravity, as Arizona does, to mean "marked by debasement, corruption, perversion or deterioration" expands rather than limits the meaning of the aggravating circumstance.

Rosen, *supra*, 64 N.C.L. Rev. at 970.

The Arizona Supreme Court has thus given its trial judges "no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859. Its pronouncements have added to the grab-bag of

vague labels which, if attached to a crime, can justify condemning the defendant. And, as it noted in this case, it has imposed no requirement that the trial court specify the particular label or labels selected. J.A. 93.

A trial judge is therefore fully authorized to do what Judge Meehan did: to decide that the crime was "grossly bad" or "shockingly evil" or "sadistic" or "perverted" or "marked by debasement" or committed with "a vile state of mind" or a "callous disregard for human life" or "a manifest disregard for the fundamental principles upon which our society is based"[31] —and thereupon to impose a death sentence, quoting the statute, without ever explaining which of these phrases he thought applied. See J.A. 56. Surely such a procedure provides no assurance that the statute's "application will be kept within identifiable boundaries." Adamson v. *Ricketts*, *supra*, 865 F.2d at 1038.

B. The Arizona Supreme Court's Review of the Application Of This Circumstance Has Provided No Principled Way To Distinguish The Few Cases In Which The Death Penalty Has Been Imposed From The Many In Which It Has Not.

The Arizona Supreme Court's actions in reviewing sentences supported by a "heinous, cruel or depraved" finding have "failed to cure the unfettered discretion of the [sentencing judge] . . . and to satisfy the commands of the Eighth Amendment." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859.

"The list of considerations that the Arizona Supreme Court has been willing to use to support one of the three terms that comprise its especially heinous aggravating factor is extremely broad." Rosen, *supra*, 64 N.C.L. Rev. at 981. "Whenever *anything* about a murder has proved offensive, . . . it has approved

[31] These are all terms the Arizona Supreme Court has used to define this aggravating factor or justify its application to a given case. *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1032.

[this finding]." *Id.* (original emphasis). "[F]or a finding that a murder was especially heinous and/or depraved the possibilities appear endless." *See Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1035 (compiling cases). A finding that a killing was "cruel" has been approved, if "the victim was conscious for a period of time before an attack . . . or after an attack . . . and suffered from either mental . . . or physical pain." *Id.* at 1034 (citations omitted). The finding will stand whether or not the defendant was "disposed to inflict pain" and whether or not the defendant was even the perpetrator of the offense. *See State* v. *Tison*, 129 Ariz. 526, 633 P.2d 335, 352 (1981) *cert. denied*, 459 U.S. 822 (1982).

Because Arizona trial judges do not particularize their finding or give any reasons for it in specific cases, their "interpretation of [the "heinous, cruel or depraved" circumstance] . . . can only be the subject of sheer speculation." *Godfrey* v. *Georgia*, *supra*, 446 U.S. at 429. The Arizona Supreme Court thus searches the whole record for facts which might justify affirmance.[32] Compare Maynard v. *Cartwright*, *supra*, 108 S.Ct. at 1859. In so doing, like its Oklahoma counterpart, the Arizona court has

> said that the attitude of the killer, the manner of the killing, or the suffering of the victim *can* support this aggravating circumstance, but the court has refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.

Cartwright v. *Maynard*, *supra*, 822 F.2d. at 1491.

Arizona has been unable to provide clearly discernable parameters to establish what kind of conduct falls within the (F)(6) circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review

[32] Although the sentencing court's findings usually provide little to review, the Arizona Supreme Court has made it clear it performs its "independent dury of review . . . as an appellate court, not as a trial court." *State* v. *Rumsey*, 136 Ariz. 166, 665 P.2d 48, 55 (1983).

the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given the complete lack of any objective standards that guide the court in its decision-making, and it unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Adamson v. *Ricketts*, *supra*, 865 F.2d at 1036-37.

The result of all this has been predictable: the (F)(6) factor has provided "no principled means . . . to distinguish those that received the [death] penalty from those that did not." *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1858. "[W]ithin the plethora of factors the Arizona Courts may consider there has been much contradiction and inconsistency in the application of the (F)(6) circumstance." *Adamson* v. *Ricketts*, *supra*, 865 F.2d at 1037-38 (describing cases). That is not the result envisioned or permitted by this Court's Eighth Amendment decisions.

C. The Application of The (F)(6) Circumstance in Petitioner's Case Underscores its Constitutional Infirmity.

Nowhere is the unpredictability of the application of the "heinous, cruel or depraved" circumstance more apparent than in Petitioner's case. The facts of Thomas Powell's homicide were sadly unremarkable. The cause of death was a single gunshot wound to the head; the assailant inflicted no other injuries.

Mr. Powell endured unusual suffering because the gunshot wound did not immediately kill him and he survived for several days in the desert. That tragic fact was the whole subject of the prosecution's evidence in aggravation. Tr. 1/26 at 234-42; Tr. 1/27 at 252-57. Although the trial court never specified its findings, its only relevant comment suggests that it accepted this argument. Tr. 1/26 at 233. However, the Arizona Supreme Court held that an (F)(6) finding could *not* be supported on this ground because Mr. "Powell's survival and longevity were neither reasonably foreseeable nor intended . . . ." J.A. 98.[33] It nevertheless assumed that the trial court had made a "finding of cruelty," and it said that such a "finding" was "supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards." *Id.*[34]

The Arizona Supreme Court did not say why it assumed that the trial court made a "finding of cruelty," nor did it pretend to know on what grounds the trial court would have based such a finding. It merely recited what it called the "ample evidence that Powell suffered substantial mental anguish prior to his death," which it found "sufficient to sustain the trial judge's finding of [the heinous, cruel or depraved] . . . aggravating factor . . . ." J.A. 97, 99, 100.

Part of that "evidence" was the Court's assumption that Mr. Powell's "fears for his life must have multiplied" while in the car with the robbers. *Id.* It based this assumption on the sequence of events[35] and Sharold Ramsey's testimony that she "told him

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[33] The Arizona court upheld a cruelty finding because a victim's unintended survival was "reasonably foreseeable," in *State* v. *Adamson*, 136 Ariz. 250, 665 P.2d 972, 988 *cert. denied*, 464 U.S. 865 (1983). In other cases, it has held that a specific intent to cause pain is required. *See, e.g.*, *State* v. *Lujan*, 124 Ariz. 365, 604 P.2d 629, 636 (1979): "For a killing to be especially cruel, the perpetrator must senselessly or sadistically inflict great pain on his victim."

[34] The Arizona Supreme Court separately said that "[s]ome circumstances suggest that the present defendant also committed the offense in a depraved manner," so "the evidence also supports the finding of depravity." J.A. 99, 100. Again, the court did not specify how it concluded that the trial court had made such a finding; and the only "circumstance" it pointed to was Ms. Ramsey's one-line testimony that Petitioner had said "he never seen a man pee in his pants before." *Id.*

[35] There was no testimony that Mr. Powell expressed fear in the car. Sharold Ramsey testified he was acting "[j]ust scared"; when pressed on how she knew, she said, "I don't know, you could just tell, I guess." J.A. 23.

not to be scared because he wouldn't be hurt." J.A. 24. Acknowledging that Ms. Ramsey's assurance may have given Mr. Powell "temporary refuge," the Court stated: "he soon realized that they meant to kill him." J.A. 97. It justified this statement by a description of the "evidence" that is unsupported by the testimony in every important particular.[36]

We assume that an appellate court cannot "cure the unfettered discretion of the [sentencer] . . . and . . . satisfy the commands of the Eighth Amendment," *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1859, by misreading the record.[37] But even if the Arizona Supreme Court's statement of the facts were accepted, it would not help "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, *supra*, 462 U.S. at 877. Numerous other Arizona murder defendants have committed crimes which plainly terrified their victims at least as much as this one did,[38] or made after-the-fact

[36] The Court's opinion says "[t]he defendant and Hoover forced Powell to lie face down on the ground"; Ramsey testified, "he got out of the car and then I guess he just got back down on the ground, I don't remember" (J.A. 24). The opinion says that, as Mr. Powell lay there, Petitioner and Hoover "argued over his fate"; Ramsey testified they "were just arguing about what they were going to tie him up with or whatever. . . ." J.A. 24. The opinion says that, when Petitioner "marched Powell off into the darkness . . . the implication was clear to Powell, who was so upset that he urinated on himself and begged the defendant not to kill him"; there was no evidence when and why Mr. Powell urinated on himself — and no one testified that he begged for his life to Petitioner, or anyone, at that time, or anytime.

[37] If, as we submit, Petitioner's death sentence rests on unreliable factual predicated, it is constitutionaly invalid on that account alone. *Johnson* v. *Mississippi*, 108 S.Ct. 1981 (1988). Of course, that issue is not before the Court on this petition.

[38] For example, see the following cases involving first degree murders which the Arizona courts did not find to be "cruel" although the victims clearly anticipated their deaths: *State* v. *Rankovich*, 159 Ariz. 116, 765 P.2d 518 (1988); *State* v. *Carr*, 154 Ariz. 468, 743 P.2d 1386 (1987); *State* v. *Vaughn*, 147 Ariz. 28, 708 P.2d 453 (1985); *State* v. *Poland*, 144 Ariz. 388, 698 P.2d 183 (1985); *State* v. *Nash*, 143 Ariz. 370, 694 P.2d 222 *cert. denied*, 471 U.S. 1143 (1985); *State* v. *Cruz-Mata*, 138 Ariz. 370, 674 P.2d 1368 (1983); *State* v. *McGuire*, 131 Ariz. 93, 638 P.2d 1339 (1981); *State* v. *Ring*, 131 Ariz. 374, 641 P.2d 862 (1982); *State* v. *Rhymes*, 129 Ariz. 56, 628 P.2d 939 (1981); *State* v. *Watkins*, 126 Ariz. 293, 614 P.2d 835 (1980); *State* v. *Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979); *State* v. *Austin*, 124 Ariz. 231, 603 P.2d 502 (1979) *cert. denied*, 446 U.S. 911 (1980);*State* v. *Ferguson*, 119 Ariz. 55, 579 P.2d 559 (1978); *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978) *cert. denied*, 440 U.S. 924 (1979); *State* v. *Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977).

statements which showed at least as much insensitivity as Petitioner's,[39] in cases in which no (F)(6) finding has been made. Indeed, just three weeks after this Petition was filed, the Arizona Supreme Court reversed a death sentence imposed for a murder committed during a gas station robbery by a 21-year-old man where the salient facts were indistinguishable from the worst alleged against Petitioner: the defendant "took the victim to the bathroom and made him kneel in front of the toilet and then shot him in the back of the head" and later "boasted" about it to friends. *State* v. *Rockwell*, ____ Ariz. ____, 775 P.2d 1069, 1075, 1076 (1989). No (F)(6) finding was made at trial or on appeal in *Rockwell*, and the fact that there was "only one aggravating circumstance—pecuniary gain," balanced against the defendant's youth and other mitigation, was the explicit ground for reversal. 775 P.2d at 1079.

[39] For example, see the following cases in which the Arizona courts did not find first degree murders "heinous" or "depraved" despite evidence the defendant boasted of his crime: *State* v. *Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988); *State* v. *Lamb*, 142 Ariz. 463, 690 P.2d 764 (1984); *State* v. *Graham*, 135 Ariz. 209, 660 P.2d 460 (1983); *State* v. *Madsen*, 125 Ariz. 346, 609 P.2d 1046 *cert. denied*, 449 U.S. 873 (1980); *State* v. *Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982); *State* v. *Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984).

If there were any doubt before, the application of the (F)(6) circumstance to Petitioner Walton's case has demonstrated its inability to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U.S. at 428. For that reason, too, his death sentence violates the Constitution.

CONCLUSION

The Judgment of the Arizona Supreme Court should be reversed.

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APPENDIX

APPENDIX A

Ariz. Rev. Stat. § 13-703 (Supp. 1986). Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the

admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provision of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

Ariz. Rev. Stat. § 13-1105 (Supp. 1986). First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, narcotics offenses under § 13-3406, subsection A, paragraph 3, 5 or 6, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson of an occupied structure under § 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504 or child abuse under § 13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.

APPENDIX B

SENTENCING STANDARDS IN CURRENT CAPITAL PUNISHMENT STATUTES

The following table describes the 37 death penalty statutes currently in force in the United States, on four parameters relevant to the second question presented in this case.

Column 1: *Mitigating Evidence Weighed?* This column describes whether the statute permits the sentencer to weigh all mitigating evidence, regardless of whether the defense meets a burden of proving the existence of some definable "circumstance."

Column 2: *Presumption of Life?* This column describes whether the statute contains a balancing formula which presumes life ("Yes"), or one which presumes death ("No"), or no presumption ("0"). Statutes requiring proof of mitigation "sufficient to call for leniency," or the like, are listed as presuming death.

Column 3: *Sufficient Aggravation Required?* This column describes whether the statute expressly permits the sentencer to inquire whether there are sufficient aggravating circumstances to warrant the death penalty, in the absence of mitigation.

Column 4: *Residual Discretion?* This column describes whether the statute gives the sentencer discretion to impose a life sentence, regardless of any particular statutory formula.

Unless otherwise noted, all descriptions are derived from the text of the statutes, which follows this table.

	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
United States				
USC Tit. 21 § 848 (k)	No	Yes	Yes	Yes
States				
ALA. CODE §§ 13A-5-46, 47	Yes	Yes	No	Yes
ARIZ. REV. STAT. § 13-703(C)	No	No	No	No
ARK. STAT. ANN. § 5-4-603(a)	Yes	Yes	Yes	No
CAL. PENAL CODE § 190.3(k)	Yes	Yes	No	No
COLO. REV. STAT. § 16-11-103(2)(a)	Yes	No	No	No
CONN. GEN. STAT. § 53-46a(f)	No*	Yes	No	No
DEL. CODE ANN. Tit. 11, § 4209(d)	Yes	Yes +	Yes	Yes
FLA. STAT. § 921.141	Yes	No	Yes	Yes
GA. CODE § 26-3102	Yes	Yes +	No	Yes
IDAHO CODE § 19-2515(c)	Yes	No	No	No
ILL. ANN. STAT. Ch.38 § 9-1(g)	Yes	No	No	No
IND. CODE ANN. § 35-50-2-9	Yes	Yes	No	Yes
KY. REV. STAT. § 532.025(1)(b)	Yes	0	No	Yes
LA. CODE CRIM. PRO. Art. 905.3	Yes	Yes +	No	Yes

	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
States				
MD. ANN. CODE Art. 27, § 413(h)	No	No	No	No
MISS. CODE ANN. § 99-19-101	Yes	No	Yes	Yes
MO. ANN. STAT. § 565-030.4	Yes	No	Yes	Yes
MONT. CODE ANN. § 46-18-305	Yes	No	No	No
NEB. REV. STAT. § 29-2522	Yes	Yes + +	Yes	Yes
NEV. REV. STAT. § 200.030.4	Yes	No	No	Yes
N.H. REV. STAT. § 630:5	Yes	0	No	Yes
N.J. STAT. ANN. § 2C:11-3(c)(3)(a)	Yes	Yes	No	No
N.M. STAT. ANN. § 31-20A2(B)	Yes	0	Yes	Yes
N.C. GEN. STAT. § 15A-2000(b)	No**	No	Yes	Yes
OH. REV. CODE ANN. § 2929.03(D)(2),(3)	Yes	Yes	No	No
OKLA. STAT. ANN. Tit. 21, § 701.11	Yes	No	No	Yes
OR. REV. STAT. § 163.150(1)(b)-(e)	Yes	Yes + + +	No	No
PA. STAT. ANN. Tit. 42, § 9711(f)	No	Yes	No	No
S.C. CODE ANN. § 16-3-20(C)	Yes	Yes +	No	Yes

States	Mitigating Evidence Weighed?	Presumption Of Life	Sufficient Aggravation Required	Residual Discretion?
S.D. CODE. LAWS § 23A-27A-4	Yes	Yes +	No	Yes
TENN. CODE ANN. § 39-2-203(f)	Yes	No	No	No
TX. CODE CRIM. PRO. Art. 37.071	Yes@	Yes + + +	No	No
UTAH CODE ANN.# § 76-3-207(3)	Yes	Yes	No	Yes
VA. CODE § 19.2-264.4.C	Yes	0	No	Yes
WA. REV. CO. DE. § 10.95.060(4)	Yes	No	No	No
WYO. STAT. § 6-2-102(d)	No	0	No	Yes

*See *State* v. *Daniels*, 207 Conn. 374, 542 A.2d 306 (1988).

**See *State* v. *Brown*, 320 N.C. 179, 358 S.E.2d 1 (1987)

+ These statutes provide for death sentence only upon affirmative recommendation by jury, but do not otherwise presume life or death.

+ + This statute asks if mitigation "approach[es] or exceed[s] weight" of aggravation.

+ + + These statutes place on the state the burden of proving, beyond a reasonable doubt, affirmative answers to special statutory questions.

#See *State* v. *Wood*, 648 P.2d 79 (Utah 1981).

@ Assumes compliance with *Penry* v. *Lynaugh*, 109 S.Ct. 2934 (1989).

Statutory Text Setting Forth Sentencing Standards

Alabama

Ala. Code § 13A-5-46(e) (1982).

(e) After deliberation, the jury shall return an advisory verdict as follows:

. . .

(3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exists and that they outweigh the mitigating circumstances, if any, it shall return an advisory verdict recommending to the trial court that the penalty be death.

Ala. Code § 13A-5-47(e) (1982).

(e) In deciding upon the sentencing, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict . . .

Arkansas

Ark. Stat. Ann. § 5-4-603 (Supp. 1987).

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify sentence of death beyond a reasonable doubt.

California

Cal. Penal Code § 190.3(k) (Deering 1985).

. . . the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose the sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances . . . .

Colorado

Colo. Rev. Stat. § 16-11-103(2) (Supp. 1988).

(2) (a) . . . the jury shall deliberate and render a decision based on the following considerations:

(I) Whether at least one statutory aggravating factor has been proved beyond a reasonable doubt . . .

(II) Whether sufficient statutory mitigating factors or other mitigating circumstances exist which outweigh any statutory aggravating factor or factors and other aggravating circumstances . . .

(b) . . .

(III) In the event that the jury finds at least one statutory aggravating factor has been proved beyond a reasonable doubt, and that there are insufficient statutory mitigating factors or other mitigating circumstances to outweigh any statutory aggravating factor or factors that were proved and other aggravating circumstances that were proved, the jury shall return a sentence of death.

Connecticut

Conn. Gen. Stat. Ann. § 53a-46a(f) (West 1985)

(f) If the jury or, if there is no jury, the court finds that one or more of the factors set forth in subsection (h) exists and that no mitigating factors exist, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that

none of the factors set forth in subsection (h) exist or that one or more mitigating factors exist, the court shall impose a sentence of life imprisonment without the possibility of release.

Delaware

Del. Code Ann. tit. 11, § 4209 (d) (1987).

(d) . . . (1) A sentence of death shall not be imposed unless the jury . . ., where appropriate, finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. Unanimously recommends, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that a sentence of death be imposed.

Florida

Fla. Stat. Ann. § 921.141 (West 1985)

(2) . . . the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) . . . Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Georgia

Ga. Code Ann. § 26-3102 (Harrison 1988).

. . . Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment . . . .

Idaho

Idaho Code § 19-2515(c) (1987).

. . . Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances . . . outweigh the gravity of any aggravating circumstance found and make the imposition of death unjust.

Illinois

Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd Supp. 1989)

(g) . . . If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exists, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death . . . .

Indiana

Ind. Code Ann. § 35-50-2-9 (Burns Supp. 1989).

(e) . . . The jury may recommend the death penalty only if it

finds:

. . .

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

Kentucky

Ky. Rev. Stat. Ann. § 532.025(1)(b) (Baldwin 1984).

(b) . . . the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in subsection (2) of this section, exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Louisiana

La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1989).

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death shall be imposed. . . .

Maryland

Md. Ann. Code art. 27 § 413(h) (1988)

(h). . .

(1) If the court or jury finds that one or more of these mitigating circumstances exists, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death. . . .

Mississippi

Miss. Code Ann. § 99-19-101 (Supp. 1989).

(2) . . . the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section.

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section, and

(c) . . . there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances.

Missouri

Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1989).

4. . . . The trier shall assess and declare the punishment of life imprisonment . . .

(2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together

with any other authorized aggravating circumstances found, warrant imposing the death sentence; or

(3) If the trier finds the existence of one or more mitigating circumstance is sufficient to outweigh the aggravating circumstance or circumstances found by the trier, or

(4) If the trier decides under all the circumstances not to assess and declare the punishment at death.

Montana

Mont. Code Ann. § 46-18-305 (1987).

. . . In determining whether to impose the sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and find that there are no mitigating circumstances sufficiently substantial to call for leniency . . . .

Nebraska

Neb. Rev. Stat. § 29-2522 (1985).

. . . . the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Nevada

Nev. Rev. Stat. § 200.030(4) (1987).

4. Every person convicted of murder in the first degree shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstances which are found do not outweigh the aggravating circumstances . . . .

New Hampshire

N.H. Rev. Stat. Ann. § 630:5 (IV) (1986).

IV. . . . the jury shall retire to determine the punishment to be imposed. If by unanimous vote the jury finds at least one statutory aggravating circumstance the jury may fix the sentence of death . . . .

New Jersey

N.J. Stat. Ann. § 2C:11-3(c)(3) (West Supp. 1989).

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death. . . .

New Mexico

N.M. Stat. Ann. § 31-20A2. (Supp. 1987).

. . .

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant shall be sentenced to death or life imprisonment.

North Carolina

N.C. Gen. Stat. § 15A-2000(b) (1988).

(b) . . .

. . . the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

Ohio

Ohio Rev. Code Ann. § 2929.03(D) (Anderson 1987).

(2) . . . the trial jury . . . shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender shall be sentenced to life . . .

(3) Upon consideration of the relevant evidence . . . if, after receiving pursuant to the division (D) (2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death upon the offender . . . .

Oklahoma

Okla. Stat. Ann. tit. 21 § 701.11 (Supp. 1989).

. . . Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed . . . .

Oregon

Or. Rev. Stat. § 163.150(1)(b)-(e) (1987).

(b) . . . the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. In determining this issue, the court shall instruct the jury to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of mental and emotional pressure under which the defendant was acting at the time the offense was committed; and

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered. . . .

(e) If the jury returns an affirmative finding on each issue considered under this section, the trial judge shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this section, the trial judge shall sentence the defendant to imprisonment

for life in the custody of the Department of Corrections as provided in ORS 163.105.

Pennsylvania

Pa. Cons. Stat. Ann. § 9711(c) (Purdon 1982).

(c) Instructions to jury. -

(1) . . . the court shall instruct the jury on the following matters:

. . .

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances . . . .

South Carolina

S.C. Code Ann. § 16-3-20(C) (Law. Co-op. Supp. 1988).

(C) . . .The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing and signed by all members of the jury, designate the aggravating circumstance or circumstances if found beyond a reasonable doubt . . . . Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

South Dakota

S.D. Codified Laws Ann. § 23A-27A-4 (1988).

. . . a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed. If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death . . . .

Tennessee

Tenn. Code Ann. § 39-2-203(g) (1982).

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence shall be death . . . .

Texas

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1988).

(b) the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

Utah

Utah Code Ann. § 76-3-207(3) (Supp. 1989).

. . . If the jury reports unanimous agreement to impose the sentence of death, the court shall charge the jury and shall impose the sentence of death . . . .

Virginia

Va. Code Ann. § 19.2-264.4(C) (1983).

(C) The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravating battery to the victim.

Washington

Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1989).

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliber-

ate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Wyoming

Wyo. Stat. § 6-2-102(d) (Supp. 1989).

(i) . . . the jury shall deliberate and render a sentence based upon the following:

(A) Whether one (1) or more aggravating circumstances exist beyond a reasonable doubt . . .

(B) Whether, by a preponderance of the evidence, mitigating circumstances exist . . . and

(C) The mere number of aggravating or mitigating circumstances found shall have no independent significance.

United States

21 U.S.C.A. § 848 (West Supp. 1989)

(j) . . . The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) . . . If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify the sentence of death. . . The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose the death sentence and the jury shall be so instructed.

No. 88-7351

(6)

FILED
DEC 21
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In The

Supreme Court of the United States

October Term, 1988

JEFFREY ALAN WALTON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The
Arizona Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Does Arizona's death penalty statute violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death?

2. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency?

3. Has the Arizona Supreme Court sufficiently defined the "especially heinous, cruel or depraved" aggravating factor to satisfy the requirements of *Maynard v. Cartwright*?

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STATEMENT OF THE CASE

On March 2, 1986, petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk, tie him up, and leave him in the desert. The three first traveled to a swap meet in Tucson and eventually arrived at a bar to wait for a victim. (J.A. at 8-16.) Thomas Powell, a young Marine on leave, left the bar and headed toward his car. Hoover whistled to let petitioner know that someone was coming. Petitioner confronted Powell, cocked his gun, and ordered him to empty his pockets and place the contents on top of his car. Powell complied with petitioner's demands and then lay down on the ground. Powell was then ordered off the ground and petitioner gave Powell's car keys to Hoover so that Hoover could drive. (J.A. at 16-20.)

Petitioner put Powell in the back seat and Hoover drove Powell's vehicle. While driving out of town to the desert, petitioner and Hoover talked to Powell, asking him where he lived and if he had any more money. Powell said that he lived in the area, but that he did not have any more money, as he had given his mother money for his sister's rent. (J.A. at 20-22.) When they arrived at an area known as Gates Pass, Powell was ordered out of the car and forced to lay on the ground. Petitioner and Hoover then began arguing in Powell's presence about what to do with him. Eventually, Hoover stated he did not care what petitioner did with Powell, whereupon petitioner told Hoover and Ramsey to turn up the car radio. Petitioner took Powell out in the desert and shot

him in the head. (J.A. at 23-26.) Powell died several days later.[1]

Petitioner returned to Powell's vehicle and said to his accomplices, "that was loud," "it sounded like a rifle." The three then went to a restaurant and bought hamburgers with the money taken from Powell. When they returned to their trailer, petitioner told Ramsey and Hoover that he should have checked Powell for a pulse, but he was sure the victim was dead because he shot him in the head. Petitioner boasted that he never saw a "man pee his pants before." (J.A. at 26-31.) After finishing his hamburger, petitioner wiped the fingerprints off the car and parked the car in a bowling alley parking lot.

Later, petitioner, Hoover, and Ramsey went to David Bilodeau's house to find some dynamite to destroy the car. Petitioner told Bilodeau that he had shot someone from the armed services in the head and he needed some dynamite to get rid of the car. Petitioner stated that the shooting took place at Gates Pass and showed Bilodeau the gun. Bilodeau told petitioner that he did not have any dynamite, and petitioner left. Bilodeau then telephoned the police and informed them what had happened. On March 5, 1986, Hoover and Ramsey left Tucson in Powell's car and went to California. (J.A. at 32-36.)

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[1] The medical examiner determined that Powell died approximately 24 hours prior to his body being discovered, which was approximately 1 week after the shooting. (R.T. 1/25/87 at 93-95.) The gunshot wound to the head blinded Powell and ultimately caused Powell to die from dehydration, starvation, and pneumonia. (R.T. 1/26/87 at 237-42.)

On December 16, 1986, the jurors found petitioner guilty of first-degree murder. (J.A. at 44.) On January 26 and 27, 1987, the trial court conducted the sentencing hearing. At the conclusion of the evidence, the trial court stated that it found beyond "any doubt" that petitioner had fired the shot that resulted in the death of Thomas Powell. (J.A. at 56.) It found two aggravating circumstances – that the crime was committed in an extremely heinous, cruel or depraved manner, and for pecuniary gain. It determined that the mitigating circumstances did not call for leniency and, therefore, sentenced petitioner to death. (J.A. at 56-58.)

SUMMARY OF ARGUMENTS

Because aggravating circumstances are not elements of the offense, and are instead sentencing factors that apply only after the defendant has been convicted, the Sixth Amendment does not require that the state provide a jury trial on the "aggravating circumstances." While aggravating circumstances are required by the Eighth Amendment, they do not enjoy the same traditional due process protections afforded elements of the crime.

The Arizona sentencing procedure that requires a defendant to prove the existence of mitigation by a preponderance of the evidence does not violate due process as it does not lessen the state's burden to prove every element of the crime. Mitigating evidence is peculiarly within the knowledge of the defendant, and the state should not be required to disprove that the defendant is entitled to leniency.

The Arizona sentencing procedure that requires the sentencer to impose death if it determines there is insufficient mitigation to warrant leniency does not create a mandatory or presumptive death penalty. Arizona's sentencing procedure mandates that the trial court consider all relevant mitigating evidence. The statute requires the imposition of the death penalty only if the court determines that the proffered mitigation is insufficient in light of the aggravation proved. In requiring that the death penalty be imposed under these circumstances, Arizona has attempted to abolish freakish or arbitrary imposition of the death penalty.

Because the facts surrounding other Arizona death penalty cases are not before this Court, this Court cannot engage in a proportionality review of all Arizona cases dealing with facts arguably similar to petitioner's case. The only constitutional issues appropriately raised are (1) has Arizona sufficiently limited the definition of the circumstance of "especially heinous, cruel, or depraved"; and (2) as defined and limited, do the facts support the Arizona Supreme Court's action in determining that the circumstance exists in the instant case.

The Arizona Supreme Court has held that a killing is "cruel" when the victim consciously suffered mental anguish or physical pain prior to death. It has held that a killing is "heinous or depraved" when the defendant had an especially depraved mental state as reflected by his words or actions at or near the time of the murder. The defendant's actions must fall into one of the following categories to constitute depravity: (1) the defendant relished in or boasted about the murder; (2) the defendant inflicted gratuitous violence upon the victim above what

was necessary to complete the object of the crime; or (3) the defendant needlessly mutilated the victim. In determining if the defendant truly exhibited a depraved mental state, the court will also consider the helplessness of the victim and the senselessness of the crime. The Arizona Supreme Court's definition of this aggravating circumstance meets the constitutional requirements of *Maynard v. Cartwright* by adequately informing the sentencer what must be present to impose death. In the instant case, the victim's mental suffering clearly shows cruelty, and petitioner's boasting about the crime clearly establishes depravity.

ARGUMENTS

I.

ARIZONA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT BY DENYING A JURY TRIAL ON AGGRAVATING CIRCUMSTANCES NECESSARY FOR THE IMPOSITION OF DEATH.

Petitioner contends that the Arizona Death Penalty procedure is in violation of the Sixth Amendment of the United States Constitution because it does not provide for jury determination of the aggravating circumstances necessary to impose death. Respondent disagrees.

A. The law in Arizona.

Arizona Revised Statutes Annotated § 13-703(B) provides:

> [T]he judge who presided at the trial or before whom the guilty plea was entered . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

The statute excludes the jury from considering the factual issues presented to the trial court in determining if the death penalty is appropriate. *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976), *cert. denied*, 433 U.S. 915 (1977). Based on this Court's opinions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), the Arizona Supreme Court has consistently held that the statute does not deprive a criminal defendant of his constitutional right to a jury trial under the Sixth Amendment. *State v. Walton*, 769 P.2d 1017, 1031 (Ariz. 1989); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984), *cert. denied*, 470 U.S. 1059 (1985). The court expressed the purpose and advantage of the Arizona procedure:

> The death penalty is reserved only for the most egregious murderers. As such, a comparison must be made among individuals. In this regard, we believe that a trial judge is more experienced at sentencing than a jury and is therefore better able to impose similar sentences in analogous cases.

State v. Gillies, 691 P.2d at 659 (citing *Proffitt v. Florida*, 428 U.S. at 252).

B. This Court has specifically determined that the Sixth Amendment right to a jury trial does not extend to the determination of aggravating factors under a state's capital sentencing procedures.

Although this Court has stated that jury sentencing is desirable in capital cases, it held in *Proffitt v. Florida* that jury sentencing was not "constitutionally required" under the Eighth Amendment. 428 U.S. at 252. It noted that judicial sentencing appeared to further the goals of the Eighth Amendment by ensuring "even greater consistency in the imposition at the trial court level . . . [of] sentences similar to those imposed in analogous cases." *Id.*

In *Spaziano v. Florida*, the defendant made a Sixth Amendment challenge to Florida's non-jury capital sentencing procedure. After the defendant was convicted of first degree murder, the trial court convened a sentencing hearing before the same jury, a majority of which recommended against the imposition of death. 468 U.S. at 451. Notwithstanding the jury's recommendation, the trial court concluded that there existed sufficient aggravating circumstances to warrant a sentence of death. 468 U.S. at 451-52. On appeal, the Florida Supreme Court reversed the sentence based on error at the sentencing hearing. 468 U.S. at 452.

On remand, the trial court conducted a new sentencing procedure without a jury. 468 U.S. at 453. At the resentencing hearing, the state presented evidence not presented to the advisory jury in the original sentencing proceeding. *Id.* The trial court relied on this new evidence to find an additional aggravating circumstance not found previously, reaffirmed a prior aggravating circumstance,

and again imposed a sentence of death. *Id.* On appeal, the Florida Supreme Court affirmed the death penalty.

In this Court, Spaziano argued that the Florida capital sentencing procedure violated "the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." 468 U.S. at 458. This Court rejected Spaziano's claims, stating:

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial.

468 U.S. at 459. This Court found that, despite the unique aspects involved in a capital sentencing proceeding, the issue to be resolved is the same as any other sentencing proceeding – "a determination of the appropriate punishment to be imposed on an individual." *Id.* To that end, "The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.* This Court concluded:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

468 U.S. at 464.

In *Hildwin v. Florida*, 109 S. Ct. 2055 (1989), this Court again considered Florida's non-jury capital sentencing procedure. The defendant there argued that the Sixth

Amendment required "a jury to specify the aggravating factors that permit the imposition of capital punishment." 109 S. Ct. at 2056. This Court recognized that *Spaziano* did not address the fact that the death penalty in Florida could only be imposed if the trial court found an aggravating circumstance, but held, however, that the "existence of an aggravating factor . . . is not an element of the offense 'but instead is a sentencing factor that comes into play only after the defendant has been found guilty.' " 109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)). This Court concluded:

> [T]he requirement that the findings be made by a judge rather than the jury [does] not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." . . . Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

Hildwin v. Florida, 109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. at 93).

C. Petitioner's contentions why this Court's holdings should not apply to Arizona's non-jury capital sentencing procedure are meritless.

Petitioner argues that *Proffitt*, *Spaziano*, and *Hildwin* are not controlling because (1) there are "significant" differences between Florida's and Arizona's sentencing procedures; and (2) under the analysis of *McMillan*, Arizona's aggravating factors are elements of capital murder.

1. There is no substantive difference between Arizona's and Florida's capital sentencing procedures.

Petitioner asserts that Arizona's sentencing procedure differs from Florida's in two significant aspects: (1) Florida provides for jury recommendation even though the ultimate determination is for the trial court, and (2) the aggravating factors play a different role in the two sentencing schemes. (Petitioner's brief at 24.) The argument that the aggravating factors play a different role within the two sentencing schemes is wholly without merit. Florida Statutes Annotated § 921.141(3)(a) requires the trial court to find the existence or non-existence of the aggravating factors listed in § 921.141(5). If the trial court does not find any of the listed aggravating factors, "the court shall impose a sentence of life imprisonment." Fla. Stat. Ann. § 921.141(3); *Barclay v. Florida*, 463 U.S. 939, 954 (1983). Under the capital sentencing laws of most states, the sentencing body is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Lowenfield v. Phelps*, 108 S. Ct. 546, 554 (1988) (citing *Gregg v. Georgia*, 428 U.S. 153, 162-64 (1976), and *Proffitt v. Florida*, 428 U.S. at 247-250)). Requiring the sentencing body to find aggravating circumstances narrows the class of persons eligible for the death penalty according to an objective legislative definition. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). Arizona's aggravating circumstances are in that regard no different from Florida's or from those of any other state that has an aggravation/mitigation system. (See Appendix A.)

Petitioner's assertion that Florida's sentencing system is significantly different than Arizona's because it

provides for an advisory jury recommendation, appears to be a distinction without difference. In *Spaziano*, this Court reviewed a death sentence that had been reimposed without a jury recommendation. 468 U.S. at 452-454. At the original sentencing hearing, the jury recommended life. 468 U.S. at 451-52. At the resentencing, the state presented evidence concerning, and the trial court found, an aggravating circumstance that was not presented to the original jury. 468 U.S. at 453. This Court found that the Florida procedure did not violate the Sixth, Eighth, or Fourteenth Amendments and affirmed the death sentence. 468 U.S. at 464. If the Sixth, Eighth, and Fourteenth Amendments do not prohibit a judge from re-imposing the death penalty over a jury's original recommendation of life, based on new evidence presented in a proceeding without the jury, Arizona's sentencing scheme must also pass constitutional muster on this issue. *Hildwin v. Florida*, 109 S. Ct. at 2057.

2. Arizona's aggravating factors are not elements of a higher crime of capital murder, thereby necessitating a jury determination of the elements of the crime.

Petitioner claims that Arizona's aggravating circumstances are elements of a higher crime of "capital" murder, thereby invoking the Sixth Amendment right to a jury trial on these findings. *Adamson v. Ricketts*, 865 F.2d 1011, 1026 (9th Cir. 1988), *cert. pending*, *Ricketts v. Adamson*, No. 88-1553.[2] This Court specifically rejected a similar argument in *Hildwin v. Florida*, stating:

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[2] *But cf. Ford v. Strickland*, 696 F.2d 804, 817-18 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983) (aggravating factors under Florida system are not elements of capital murder).

> [A]n aggravating factor . . . is not an element of the offense but instead "a sentencing factor that comes into play only after the defendant has been found guilty."

109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. at 86).[3] This Court's holding in *Hildwin* is consistent with Eighth Amendment analysis in other cases. *Poland v. Arizona*, 476 U.S. 147 (1986); *Cabana v. Bullock*, 474 U.S. 376 (1986).

In *Poland v. Arizona*, 476 U.S. 147, the issue was whether the Double Jeopardy Clause barred further capital sentencing proceedings when, on appeal, the reviewing court found insufficient evidence to support the only aggravating factor on which the sentencer had relied. 476 U.S. at 148. This Court rejected Poland's fundamental premise that a capital sentencer's failure to find the particular aggravating circumstance alleged by the state constituted an "acquittal" of that circumstance for double jeopardy purposes. This Court held that double jeopardy protection only applied if the sentencing body, or the reviewing court, determined that the prosecution had not

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[3] Petitioner and the amici both assert that the issue whether the Sixth Amendment requires a jury determination of the existence of aggravating factors was not before the Court in *Hildwin*. In its opinion, however, this Court specifically identified the issue to be addressed:

> This case presents us once again with the question whether the Sixth Amendment requires *a jury to specify the aggravating factors that permit the imposition of capital punishment* in Florida.

109 S. Ct. at 2056 (emphasis added).

proved *"that the death penalty is appropriate."* 476 U.S. at 155 (emphasis in original). This Court stated:

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty).

476 U.S. at 156 (citations omitted). Petitioner's assertion that an aggravating circumstance is an element of the higher offense of "capital murder" is in conflict with *Poland* because an acquittal on an element of the offense would bar subsequent prosecution. *Ashe v. Swenson*, 397 U.S. 436 (1970). Aggravating factors are not elements of the offense, but are instead sentencing factors that come into play only after the defendant has been found guilty. *Hildwin v. Florida*, 109 S. Ct. at 2057.

The holding in *Hildwin* is also supported by this Court's decision in *Cabana v. Bullock*, 474 U.S. 376. There this Court was asked to determine if a capital defendant was entitled to a jury trial on the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund* held that the principles of proportionality embodied in the Eighth Amendment barred imposition of the death penalty upon a class of persons who did not themselves kill, attempt to kill, or intend to kill. 474 U.S. at 385. While the "Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital

murder that must be found by the jury." 474 U.S. at 385 n.3. The procedures required under *Enmund*, like the procedures required under *Furman v. Georgia*, 408 U.S. 238 (1972), are based on the principles contained in the Eighth Amendment. *Enmund v. Florida*, 458 U.S. at 810 n.19 (O'Connor, J. dissenting); *Gregg v. Georgia*, 428 U.S. at 189. While these procedures may be mandated by the principles underlying the Eighth Amendment, this Court has steadfastly refused to grant these procedures the same constitutional stature as elements of an offense, thereby invoking the jury trial right under the Sixth Amendment or double jeopardy protection. *Hildwin v. Florida*, 109 S. Ct. at 2057; *Poland v. Arizona*, 476 U.S. at 156; *Cabana v. Bullock*, 474 U.S. at 386.

Finally, petitioner argues, based on *McMillan*, that the Arizona capital sentencing procedure has created an offense of "capital murder" because the finding of an aggravating factor "ups the ante." *McMillan v. Pennsylvania*, 477 U.S. at 89. Capital punishment has, however, been within the range of punishment for a first-degree murderer in Arizona since statehood.[4] The Arizona legislature adopted the present aggravation/mitigation system from the Model Penal Code § 210.6 (Proposed Official Draft, 1962) in response to this Court's decision in *Furman*. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz.), *cert. denied*, 461 U.S. 971 (1983). The Arizona Supreme Court has

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[4] *See* Ariz. Rev. Stat. Ann. §§ 13-453 and -454 (repealed Oct. 1, 1978); Ariz. Code Ann. §§ 43-2903 and 44-1814 (1939); Ariz. Rev. Code Ann. §§ 4585 and 5050 (1928); Ariz. Pen. Code § 1046 (1913); Ariz. Pen. Code § 933 (1901).

specifically rejected the argument that the present sentencing system creates an aggravated or capital murder class of homicide in Arizona, and found instead that the procedure "merely sets forth guidelines for the determination of punishment after one is convicted of first degree murder." *State v. Blazak*, 560 P.2d 54, 61 (Ariz. 1977). While Arizona's capital sentencing procedures offer criminal defendants some of the protection traditionally afforded *elements of a crime* (i.e., proof beyond a reasonable doubt with evidence admissible only in accordance with the rules of evidence), the legislative intent was only to comply with this Court's procedural requirements under the Eighth Amendment and not to create a substantive offense of capital murder. *Id. McMillan* does not transform "aggravating factors" into "elements" of a higher offense. *Hildwin v. Florida*, 109 S. Ct. at 2057.

II.

THE ARIZONA DEATH PENALTY STATUTE DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BY REQUIRING THE TRIAL COURT TO IMPOSE THE DEATH PENALTY IF IT FINDS THAT THE DEFENDANT HAS FAILED TO PROVE THE EXISTENCE OF MITIGATING EVIDENCE SUFFICIENT TO CALL FOR LENIENCY.

Petitioner asserts that the Arizona death penalty statute violates due process by: (1) requiring a criminal defendant to prove the existence of mitigation by a preponderance of the evidence; and (2) creating a statutory presumptive or mandatory death penalty. Respondent disagrees.

A. Arizona's requirement that the defendant prove the existence of mitigation by a preponderance of the evidence does not violate the constitutional guarantees of due process.

1. The law in Arizona.

The relevant portion of Arizona Revised Statutes Annotated § 13-703(C) provides:

> The prosecution and the defendant shall be permitted to rebut any information received at the [sentencing] hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F [aggravation] and G [mitigation] of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

The Arizona Supreme Court has interpreted the statute to mean that the trial court acts "first as the fact finder" at the sentencing hearing. *State v. Leslie*, 708 P.2d 719, 730 (Ariz. 1985). The trial court must first consider whether the state has proven beyond a reasonable doubt facts supporting any of the statutorily-defined aggravating factors. *Id.* The trial court must then consider whether the defendant has shown the existence of mitigating circumstances by a preponderance of the evidence. *Id.* Mitigating circumstances are defined as any facts "relevant in determining whether to impose a sentence less than death." Ariz. Rev. Stat. Ann. § 13-703(G); *State v. Leslie*, 708 P.2d at 730. *"After the trial court has made these findings*

of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency." *State v. Leslie*, 708 P.2d at 730 (emphasis added). The reason for the evidentiary standard is that "[f]acts which would tend to show mitigation are peculiarly within the knowledge of [the] defendant." *State v. Smith*, 610 P.2d 46, 50 (Ariz. 1980). Therefore, to require the state to negate every possible mitigating circumstance would place an impossible burden on the prosecution. *State v. Watson*, 586 P.2d 1253, 1259 (Ariz. 1978), *cert. denied*, 440 U.S. 924 (1979).

In making its factual determinations, the trial court is to place on the record a list of all factors considered by the court in mitigation. *State v. Leslie*, 708 P.2d at 731. If the trial court rejects mitigating evidence, it must explain its reasons for doing so. *Id.* The Arizona Supreme Court requires this statement on the record to enable the reviewing court to determine whether the trial court has "considered" all mitigating facts prior to imposing sentence. *Id.*

2. Petitioner's right to due process of law is not offended by the Arizona requirement that facts in mitigation be proved by a preponderance of the evidence.

The sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The fact that due process applies to the sentencing proceeding does not, however, implicate the entire panoply of criminal trial procedural rights:

> Once it is determined that due process applies, the question remains what process is due . . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands . . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

430 U.S. at 358 n.9. (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). This Court has held that not all due process rights apply in capital sentencing. *Hildwin v. Florida*, 104 L. Ed. 2d at 732 (no right to a jury trial on facts supporting imposition of death penalty); *Poland v. Arizona*, 476 U.S. 147 (no right to double jeopardy protection on finding of aggravating circumstance); *Spaziano v. Florida*, 468 U.S. 447 (no right to jury sentencing); *Williams v. New York*, 337 U.S. 241 (1949) (confrontation clause does not apply in capital sentencing). This Court has found other procedural rights in capital sentencing proceedings to require due process safeguards. *Estelle v. Smith*, 451 U.S. 454 (1981) (Fifth Amendment right against self-incrimination and Sixth Amendment right to an attorney applicable to procedures used to secure evidence for sentencing); *Gardner v. Florida*, 430 U.S. 349 (due process violated when sentence may be based on facts not disclosed to the defendant).

This Court has yet to determine whether imposing an evidentiary burden on a defendant to prove the existence of mitigation violates due process.[5] This Court has,

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[5] A similar issue was raised in *Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978). The Court never reached the issue. *Id.* This Court was again presented with this issue in *McKoy v. North Carolina*, No. 88-5909. However, at oral argument counsel for

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however, sustained statutes under a due process challenge that required defendants to prove by a preponderance of the evidence the affirmative defense of self-defense and extreme emotional disturbance. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976). This Court has likewise affirmed the propriety of a statutorily-imposed burden of proof of beyond a reasonable doubt regarding a criminal defendant's claim of insanity. *Leland v. Oregon*, 343 U.S. 790 (1952). The thrust of these opinions is that the states maintain a preeminent role in preventing and dealing with crime. Further, this Court will only reluctantly disturb a state's definition of criminal conduct and "the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion." *Martin v. Ohio*, 107 S. Ct. at 1101; *accord*, *Patterson v. New York*, 432 U.S. at 201-02. So long as the state's method in allocating the respective burdens of proof does not lessen the state's burden to prove every element of the offense charged, placing a corresponding burden on a criminal defendant to prove an affirmative defense does not violate due process. *Martin v. Ohio*, 107 S. Ct. at 1101. In view of these cases, a statute that requires an already "convicted" defendant to prove mitigation by establishing the truth of what he asserts by a preponderance of the evidence does not violate the Constitution.

In reviewing a sentencing body's consideration of mitigation, this Court has indicated that a sentencer may

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McKoy conceded that the state could "require proof of a mitigating circumstance by a preponderance of the evidence." (Tr. O.A. at 9.)

"evaluate the evidence in mitigation and find it wanting as a matter of fact." Eddings v. Oklahoma, 455 U.S. 104, 113 (1982) (emphasis added). Because a sentencer may decline to find mitigation as a matter of fact, the question is then whether due process forbids the state from placing on the defendant the burden of producing and proving the existence of mitigating evidence.

Several federal courts have decided that due process does not prohibit the Government from placing on a defendant the burden of proving mitigation in the context of non-capital sentencing. *United States v. Burke*, 1989 U.S. App. Lexis 16350, at 19 n.10 (D.C. Cir. 1989); *United States v. McDowell*, 1989 U.S. App. Lexis 16146, at 16 (3rd Cir. 1989); *United States v. Urrego-Linares*, 879 F.2d 1234, 1238-39 (4th Cir.), *cert. denied*, 108 S. Ct. 350 (1989); *United States v. Wilson*, 884 F.2d 1355 (11th Cir. 1989); *see also Lockett v. Ohio*, 438 U.S. at 633 (Rehnquist, J. dissenting) (no constitutional infirmity in placing burden of persuasion on defendant to prove mitigation). In *Urrego-Linares*, the court noted that a defendant's conviction determines the sentencing range. 879 F.2d at 1239. If the Government seeks to enhance the sentencing range and potentially increase the ultimate penalty, the Government bears the burden of proof. *Id.* If the defendant advances a mitigating factor that, if accepted by the court, would lower the sentencing range and potentially reduce the ultimate penalty, "the defendant should bear the burden of proof to establish the mitigating factor(s) by a preponderance." *Id.* The court concluded:

> A defendant must be afforded an opportunity to contest assertions by the government that are designed to enhance his sentence, and to offer evidence in support of factors that may warrant a reduced sentence. *However, neither concerns of procedural due process nor any other good reason suggest that a defendant should be able to put the burden on the government to prove that the defendant should not receive any particular mitigating adjustment.*

Id. (emphasis added, citations omitted). For capital sentencing, the United States Congress has adopted a procedure similar to that used in Arizona. 21 U.S.C. § 848(j) (the Government must prove aggravation beyond a reasonable doubt, the defendant must prove mitigation "by a preponderance of the evidence").

The Arizona procedure meets the criteria set forth in *Urrego-Linares*. The defendant in Arizona is afforded the opportunity to contest the evidence the state presents to enhance (aggravate) his penalty. Ariz. Rev. Stat. Ann. § 13-703(C) ("the defendant shall be permitted to rebut any information received . . . and shall be given fair opportunity to present argument as to the adequacy of the information."). The defendant is allowed to present *any* evidence to substantiate his claim of mitigation and in so doing is not limited by trial evidentiary standards. Ariz. Rev. Stat. Ann. § 13-703(C) ("Any information relevant to any mitigating circumstances . . . may be presented . . . regardless of its admissibility under the rules governing admission of evidence at criminal trials."). "[N]either concerns of procedural due process nor any other good reason suggest" that the burden to disprove that mitigation exists should be placed on the state. *United States v. Urrego-Linares*, 879 F.2d at 1239; *accord*, *State v. Smith*, 610 P.2d at 50; *State v. Watson*, 586 P.2d at 1259.

Petitioner attempts to bring Arizona's evidentiary burden within this Court's decisions in *Lockett*, *Eddings*, and *Mills v. Maryland*, 108 S. Ct. 1860 (1988). *Lockett* and *Eddings* are clearly not applicable since the Arizona sentencing procedure requires the sentencer to consider all

relevant evidence to determine whether to "impose a sentence less than death." Ariz. Rev. Stat. Ann. § 13-703(G). Furthermore, as discussed below, there is nothing in the record that would indicate that the trial court did not follow the law. *Cf. Eddings v. Oklahoma*, 455 U.S. at 115 n.10 (sentencer may not exclude relevant mitigating evidence as a matter of law by refusing to listen). The Maryland sentencing procedure discussed in *Mills* is also distinguishable from that used in Arizona. In *Mills*, the jurors were instructed first to determine whether the state had proved the existence of aggravating circumstances beyond a reasonable doubt. If the jurors found aggravation, they then determined if the defendant had proved by a preponderance of the evidence the existence of mitigating circumstances. 108 S. Ct. at 1870-71. The judge's instruction to the jurors indicated that, if the jurors did not unanimously find an aggravating circumstance, the jurors were required to mark "no" by the listed circumstance. 108 S. Ct. at 1867. The trial court did not explain to the jurors, however, that in determining the existence of mitigation, if one or more of the jurors, but not all, did not find that the circumstance existed, the jury was not obligated to mark "no" by the listed circumstance. *Id.* Justice Blackmun, writing for the plurality, found that the procedure could preclude the jurors from considering:

> *[A]s a mitigating factor*, an aspect of a defendant's character or record or a circumstance of the offense that the defendant proffered as a basis for a sentence less than death, if even a single juror adhered to the view that such a factor should not be so considered.

108 S. Ct. at 1868 (citation omitted, emphasis in original). While the Court held that the Maryland procedure violated due process guarantees, the opinion indicated that

the perceived flaw was inapplicable to judicial sentencings. 108 S. Ct. at 1865 n.5. The perceived error in *Mills* would not affect judicial sentencing because the trial court is certainly capable of determining the factual existence of mitigation. *Eddings v. Oklahoma*, 455 U.S. at 113. If the trial court determines that the claimed mitigation does not exist, the trial court may properly refuse to consider it. *See California v. Brown*, 479 U.S. 538 (1987).

Petitioner argues, however, that the trial court under the Arizona system is precluded from considering facts that do not meet the evidentiary standard, although such facts may cause the trial court to have reservations about the death penalty. *Adamson v. Ricketts*, 865 F.2d at 1041. This is not a correct interpretation of the Arizona sentencing procedure. The Arizona sentencing procedure involves two steps. The first step requires the trial court to determine what facts exist. *State v. Leslie*, 708 P.2d at 730. Arizona requires that the defendant prove by a preponderance of the evidence the *existence* of what he asserts in this phase of the sentencing procedure. *State v. Leslie*, 708 P.2d at 730; *State v. Harding*, 670 P.2d 383, 397 (Ariz. 1983), *cert. denied*, 465 U.S. 1013 (1984); *State v. Greenawalt*, 624 P.2d 828, 851 (Ariz.), *cert. denied*, 454 U.S. 882 (1981). The preponderance standard[6] is the bare

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[6] Justice Harlan succinctly explained the purpose of an evidentiary standard in his concurring opinion in *In re Winship*:

> [I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can

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minimum standard in Arizona and is met by convincing the trier-of-fact that the claim asserted is "probably true." C. McCormick, *Law of Evidence* § 339, at 956 (3rd ed. E. Cleary 1984); *State v. King*, 763 P.2d 239, 242 (Ariz. 1988).

In *Adamson v. Ricketts*, the Ninth Circuit conceded that Arizona may require the defendant to produce mitigation, but objected to the preponderance standard. 865 F.2d at 1039-44. To hold the defendant to anything less than a preponderance standard would mean that the trial court would have to accept anything the defendant said as true, even if the trial court found the statement to be "blatant perjury." *State v. James*, 685 P.2d 1293, 1300 (Ariz.), *cert. denied*, 469 U.S. 990 (1984);[7] *accord*, *Barclay v. Florida*, 463 U.S. at 971-72 (trial court need not rely on

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> acquire is a belief of what *probably* happened. The intensity of this belief – the degree to which a factfinder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

397 U.S. 358, 370 (1970) (Harlan, J. concurring) (emphasis in original).

[7] *See also State v. Wallace*, 728 P.2d 232, 239 (Ariz. 1986), *cert. denied*, 483 U.S. 1011 (1987) (defendant's claim of intoxication refuted by evidence in the record); *State v. Correll*, 715 P.2d 721, 735 (Ariz. 1986) (defendant's claim of past psychological problems not supported by the record); *State v. Martinez-Villareal*, 702 P.2d 670, 679 (Ariz. 1985), *cert. denied*, 474 U.S. 975 (defendant's claim of "unwilling participant" refuted by the evidence); *State v. Poland*, 698 P.2d 207, 210 (Ariz.), *cert. granted*, 474 U.S. 816 (1985) (defendant's claim of good reputation not proved given his admission at trial that he engaged in numerous criminal activities).

claim of no prior criminal record when presentence report demonstrates numerous convictions) (Stevens, J. concurring). While respondent agrees that the trial court must consider any *fact* constituting relevant mitigation, it may consider such evidence and determine it wanting as a matter of fact. *Eddings v. Oklahoma*, 455 U.S. at 113. Requiring a defendant to prove that the claimed mitigation is probably true is not violative of due process. *United States v. Urrego-Linares*, 879 F.2d at 1239.

During the next phase of the Arizona sentencing hearing, the trial court must determine the weight to be given the aggravating and mitigating facts it has found to exist. *State v. Gretzler*, 659 P.2d at 13. Even where the defendant proves certain facts exist, the sentencer does not have to agree that they constitute mitigation. *Raulerson v. Wainwright*, 732 F.2d 803, 807 (11th Cir.), *cert. denied*, 469 U.S. 966 (1984); *State v. Correll*, 715 P.2d at 735 (defendant's cooperation in preparing presentence report is not a mitigating factor); *State v. Smith*, 707 P.2d 289, 299 (1985) (defendant's age (30) is not a mitigating factor); *accord*, *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (how many times defendant showers is not relevant mitigation). After balancing the factors, the trial court determines what the appropriate penalty should be, based on the evidence. *State v. Gretzler*, 659 P.2d at 13.

If the trial court determines that the defendant has failed to prove the existence of the facts offered in mitigation, the trial court is, in essence, finding that the assertions are unbelievable and, hence, not worthy of further consideration. To require the trial court to nonetheless assign mitigating weight to the mere assertion is a concept unsupported by anything in Eighth Amendment jurisprudence.

3. The trial court properly considered all mitigating evidence proffered by petitioner.

After petitioner's conviction, petitioner filed a presentence memorandum wherein he challenged the legal sufficiency and the weight to be given to the state's noticed aggravating factors, and proffered a list of mitigating circumstances to be considered by the trial court. (R. 477-85.)[8] At the sentencing hearing, petitioner presented psychiatric evidence to support his claim that he suffered from drug abuse at the time of the murder, thereby impairing his judgment. (R.T. 1/27/87 at 265.) On cross-examination, petitioner's expert conceded that petitioner did not suffer "any thought disorder" and that petitioner knew the nature and quality of his acts at the time of the offense. (R.T. 1/27/87 at 271.) The expert also testified that his conclusion about petitioner's drug addiction was based entirely on statements made by petitioner that could be false. (R.T. 1/27/89 at 272.) The expert concluded as follows:

> Q [prosecuting attorney]. Would you agree with me based upon your evaluation and the records presented to you that Mr. Walton is certainly not the kind of individual that you would want to see in the community or on the streets given the type of behavior he has engaged in?
>
> A [psychiatric expert]. I think he has some very maladapted behavior and that he's unfortunately become sort of an institutionalized

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[8] Petitioner asked the court to consider the following mitigating factors: (1) mental impairment based on petitioner's substance abuse; (2) petitioner's claim that his codefendant (Hoover) actually killed the victim; (3) petitioner's age (20); (4) petitioner did not attempt to flee; and (5) proportionality of a death sentence in light of the fact that one codefendant (Ramsey) received only 28 years. (R. 483-85.)

> person, his ability to function outside an institution does not obviously work very well.
>
> Q. That would cause you a great deal of concern?
>
> A. I would say that he certainly presents difficulties to the community, yes.

(R.T. 1/27/87 at 274-75.)

The presentence report indicated that petitioner, although only 20 years old, already had prior felony convictions for armed robbery, aggravated robbery, attempted armed robbery, attempted aggravated robbery, and escape. (Presentence Report filed 1/27/87 at 2.) In addition to these felony convictions, petitioner had numerous juvenile adjudications. (*Id.*) Petitioner admitted that he spent a majority of his time while incarcerated in "deadlock" due to being a disciplinary problem. (*Id.* at 7.) While petitioner was in custody for the instant charge, he was indicted for threatening a correctional officer with a towel hook. (*Id.*)

At the conclusion of the evidentiary portion of the sentencing hearing, petitioner reargued the mitigating factors previously argued in the memorandum. (J.A. at 48-50.) The trial court found as follows:

> The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.
>
> The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.
>
> The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been significantly impaired

but not so impaired as to constitute a defense to prosecution.

The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the pre-sentence report and all other mitigating circumstances as stated by your attorney on the record this date.

(J.A. at 56-57.) Of the five mitigating factors proffered by petitioner, the trial court rejected (and therefore did not assign mitigating weight) only petitioner's claim that codefendant Hoover shot the victim. The trial court found the remaining mitigating evidence insufficient to outweigh the aggravating evidence presented. Because the evidence was overwhelming that it was petitioner who shot the victim, there was no error in the trial court's factual determinations.

B. The Arizona statute properly requires that the death penalty be imposed if the trial court determines that the mitigating circumstances are insufficiently substantial to call for leniency.

Petitioner contends that the Arizona death penalty statute's requirement that the trial court impose a sentence of death if it concludes that the aggravating circumstances outweigh the mitigating circumstances creates a mandatory or presumptive sentencing scheme and is thus unconstitutional. Respondent disagrees.

1. The law in Arizona.

Arizona Revised Statutes Annotated § 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F [aggravation] and G [mitigation] of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Arizona Revised Statutes Annotated § 13-703(F) provides a specific list of aggravating circumstances to be considered in capital sentencing decisions, and further requires the trial court to consider any relevant mitigating evidence in determining whether to impose a death sentence. *State v. Gretzler*, 659 P.2d at 12-13. Where none of the statutory aggravating circumstances is found, the statute prohibits the death penalty. *Id.*; *State v. Madsen*, 609 P.2d 1046, 1053 (Ariz.), *cert. denied*, 449 U.S. 873 (1980). Where one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed. *State v. Jordan*, 672 P.2d 169, 173 (Ariz. 1983); *State v. Gretzler*, 659 P.2d at 13. Where both aggravating and mitigating circumstances are found in a given case, however, the trial court must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E); *State v. Gretzler*, 659 P.2d at 13.

The balancing procedure is not a mechanistic determination of the *number* of aggravating and mitigating circumstances presented, but instead requires the trial court to determine and compare the "gravity" of the circumstances found. *State v. Gretzler*, 659 P.2d at 13.[9] In

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[9] In his brief, petitioner implies that the trial court does not determine the weight to be given an aggravating factor. (Petitioner's brief at 32 n.26, 36.) This is clearly not the law. In *State v. Romanosky*, 1989 Ariz. Lexis 183 (1989), the Arizona Supreme Court held that a defendant may produce extrinsic

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arriving at a just result, the trial court must "carefully consider all the 'compassionate or mitigating factors stemming from the diverse frailties of humankind.' " 659 P.2d at 13 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

As an additional safeguard, the Arizona Supreme Court conducts a de novo review of the trial court's determinations. *State v. Rockwell*, 775 P.2d 1069, 1079 (Ariz. 1989); *State v. Gretzler*, 659 P.2d at 14; *State v. Richmond*, 560 P.2d at 51. On mandatory appeal, the Arizona Supreme Court does not review the record merely to determine if the trial court "properly imposed the death penalty," it determines whether *it* believes "that the death penalty should be imposed." *State v. Rockwell*, 775 P.2d at 1080 (citing *State v. Watson*, 628 P.2d at 946). When the Arizona Supreme Court has doubt whether the death penalty should have been imposed, it "will resolve that doubt in favor of a life sentence." *State v. Rockwell*, 775 P.2d at 1080; *State v. Marlow*, 1989 Ariz. Lexis 192, at 21

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evidence surrounding the nature and circumstances of a prior violent felony conviction to mitigate the weight to be afforded the conviction as an aggravating circumstance. 1989 Ariz. Lexis 183, at 32-33 n.9. The state may not use extrinsic evidence to prove that the prior conviction was "violent," as the state is limited to the statutory definition of the offense to establish the aggravating circumstance. *Id.* If the statute defines the prior conviction as violent, however, the state may proffer extrinsic evidence to give additional "weight" to the aggravating circumstance. *State v. Gillies*, 662 P.2d 1007, 1018 (Ariz. 1983); *State v. Greenawalt*, 624 P.2d at 849. *See also State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979) (trial court must "weigh" the respective factors in determining the appropriate punishment); *State v. Watson*, 586 P.2d at 1260 (defendant may offer evidence that minimum sentence was imposed on prior conviction to lessen its impact).

(1989) (citing *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)). Thus, under the Arizona procedure, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended." *State v. Beaty*, 762 P.2d 519, 534 (Ariz. 1988), *cert. denied*, 109 S. Ct. 3200 (1989).[10]

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[10] In his brief, petitioner takes bits and pieces of the Arizona Supreme Court's opinion in *Beaty* and argues that the Arizona statute takes away the trial court's sentencing discretion. (Petitioner's brief at 36-37.) A complete reading of *Beaty* shows just the opposite:

> The statute takes the human element out of the imposition of the death penalty and in doing so supports the constitutionality of the statute. Under the statute, a defendant will stand the same chance of receiving the death penalty from a judge who does not philosophically believe in the death penalty as from a judge who does. By taking the human factor out of the sentencing process the death penalty is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended.

762 P.2d at 534. The case clearly does not stand for the proposition that the trial court may not exercise its discretion in weighing and balancing the aggravating and mitigating circumstances. The statute merely precludes the trial court from imposing a life sentence based on its sentencing philosophy after it has determined that the aggravating circumstances outweigh the mitigation. *See State v. McMurtrey*, 726 P.2d 202, 204 (Ariz. 1986), *cert. denied*, 480 U.S. 911 (1987) (trial court would not have imposed death based on personal beliefs, however, defendant certainly qualified). If the statute provided otherwise, it would truly be arbitrary. *Cf. Witherspoon v. Illinois*, 391 U.S. 510 (1960) (state may exclude potential jurors if they cannot conscientiously impose the death penalty); *California v. Brown*, 479 U.S. 538 (imposition of death sentence should be based on only relevant circumstances).

2. The Arizona capital sentencing procedure does not create a presumptive or mandatory death sentence in violation of the Eighth Amendment.

In 1976, this Court upheld three "guided-discretion" statutes, emphasizing that those schemes appropriately narrowed the class of death penalty-eligible offenders, and permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and the individual defendant. *Gregg v. Georgia*, 428 U.S. at 197; *Proffitt v. Florida*, 428 U.S. at 251-52; *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976). This Court declared two mandatory sentencing schemes unconstitutional, stressing that the systems were fatally flawed by their failure to permit presentation of mitigating circumstances for consideration by the sentencing authority. *Woodson v. North Carolina*, 428 U.S. at 303-05; *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). Thus, these cases held that (1) the procedure must narrow the class of offenders eligible for the death penalty, and (2) "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." *Sumner v. Shuman*, 107 S. Ct. 2416, 2720 (1987); *Gregg v. Georgia*, 428 U.S. at 189 n.38. So long as the sentencing scheme meets these two requirements, it is constitutional.

The Arizona capital sentencing procedure is a proper application of these requirements. Arizona's procedure narrows the class of death penalty-eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. *State v. Gretzler*, 659 P.2d at 13-14; *State v. Correll*, 715 P.2d at 735. Arizona requires the trial court to impose the death sentence only after the court determines that

the aggravating circumstances outweigh the mitigating circumstances. *State v. Gretzler*, 659 P.2d at 13. By requiring the trial court to consider all relevant evidence in mitigation, and then instructing the court to impose a sentence of death if the mitigating circumstances are not sufficiently substantial to call for leniency, Arizona's statute allows for the individual consideration required under *Lockett* and *Eddings*, and at the same time avoids the arbitrary imposition of death that this Court condemned in *Furman*.

Petitioner argues, however, that this provision of the statute is unconstitutional because it creates a "mandatory death penalty" or a "presumption" of death that precludes individualized sentencing based on the circumstances of the offense and the offender. *Adamson v. Ricketts*, 865 F.2d at 1041-42; *Jackson v. Dugger*, 837 F.2d 1469, 1474 (11th Cir.), *cert. denied*, 108 S. Ct. 2005 (1988).[11] The argument is an unwarranted extension of this Court's jurisprudence and would engraft a third requirement of "unbridled discretion" for sentencers.

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[11] The "presumption" of death found unconstitutional by the Eleventh Circuit in *Jackson v. Dugger* is clearly not applicable to the Arizona capital sentencing scheme. The Florida jury instruction at issue in *Jackson* stated, "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided." 837 F.2d at 1473. Arizona's sentencing system does not give any specific weight to any of the aggravating factors, and the trial court must determine the weight of the factors by the "gravity" shown. *State v. Gillies*, 662 P.2d at 1018; *State v. Gretzler*, 659 P.2d at 13; *State v. Romanosky*, 1989 Ariz. Lexis 183, at 32-33 n.9. The trial court's discretion is only controlled after the court weighs the circumstances presented and determines that the aggravation outweighs the mitigation. Unlike *Jackson*, in Arizona there is no "presumption" that, on balancing the circumstances, the trial court will arrive at any particular conclusion.

Contrary to petitioner's assertion that unbridled discretion is required under the Eighth Amendment, this Court has merely indicated that it will *tolerate* "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death penalty eligibility, and has considered all mitigating evidence:

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that states cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Franklin v. Lynaugh, 108 S. Ct. 2320, 2331 (1988); *see also Lowenfield v. Phelps*, 108 S. Ct. at 555; *California v. Brown*, 479 U.S. at 541.[12] Understandably, Arizona, and other states, chose to channel the discretion of sentencers in considering the circumstances and determining the final penalty after this Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created a substantial risk that the death penalty would be inflicted in an "arbitrary and capricious

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[12] In *California v. Brown*, this Court held that it was proper to instruct jurors not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in deciding the sentence. This Court noted that neither Brown nor the California Supreme Court contended that such factors, unrelated to relevant mitigation, should play any role in the sentencing determination. 479 U.S. at 542. Because the Constitution permits the instruction given in *Brown*, the Constitution does not require that the sentencer be allowed to impose life capriciously when the defendant cannot produce relevant or substantial mitigation.

manner."[13] *Gregg v. Georgia*, 428 U.S. at 188. Channeling a sentencer's discretion serves the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. *See California v. Brown*, 479 U.S. at 543. Furthermore, it ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." *Proffitt v. Florida*, 428 U.S. at 260 (White, J. concurring); *Jurek v. Texas*, 428 U.S. at 278-79 (White, J. concurring). The channeling of a sentencer's discretion "minimize[s] the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189. Such schemes promote the rational and predictable administration of death penalty laws. *California v. Brown*, 479 U.S. at 541. Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 238 (White, J. concurring). They also foster reliability in further judicial review. *California v. Brown*, 479 U.S. at 543.

This Court has reviewed and affirmed sentencing schemes with guided discretion. In *Proffitt v. Florida*, this

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[13] *See, e.g., McKenzie v. Risley*, 842 F.2d 1525, 1543 (9th Cir.), *cert. denied*, 109 S. Ct. 250 (1988); *Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 380 (1988); *People v. Boyde*, 758 P.2d 25 (Cal. 1988), *cert. granted*, 109 S. Ct. 2447 (1989); *People v. Montgomery*, 494 N.E.2d 475, 482 (Ill. 1986), *cert. denied*, 479 U.S. 1101 (1987); *State v. Tichnell*, 509 A.2d 1179, 1999 (Md.), *cert. denied*, 479 U.S. 995 (1986); *State v. Coleman*, 605 P.2d 1000, 1016 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980); *State v. Ramseur*, 524 A.2d 188, 287 n.81 (N.J. 1987); *State v. Jenkins*, 473 N.E.2d 264, 280-281 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985); *Commonwealth v. Blystone*, 549 A.2d 81 (Pa. 1988), *cert. granted*, 109 S. Ct. 1567 (1989); *State v. Dicks*, 615 S.W.2d 126, 131 (Tenn.), *cert. denied*, 454 U.S. 933 (1981); *State v. Jeffries*, 717 P.2d 722, 737 (Wash. 1986).

Court approved a statute that required imposition of the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Florida had interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. *Barclay v. Florida*, 463 U.S. at 961-62 (Stevens, J. concurring) (citing *Cooper v. State*, 336 So.2d 1133, 1142 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977)); *see also Woodson v. North Carolina*, 428 U.S. at 315 (Rehnquist, J. dissenting); *Roberts v. Louisiana*, 428 U.S. at 362 n.8 (White, J. dissenting). The concurrence in *Proffitt* praised the Florida statute because it "required" the sentencer to impose the death penalty if aggravating circumstances outweighed mitigating circumstances. *Proffitt v. Florida*, 428 U.S. at 260-61 (White, J. concurring). When this Court again approved Florida's statute in *Barclay v. Florida*, Florida still interpreted its statute as establishing a rebuttable "presumption" of death. *Barclay v. Florida*, 463 U.S. at 961-62 (Stevens, J. concurring) (citing *Williams v. State*, 386 So. 2d 538, 543 (Fla. 1980)).

This Court has likewise approved the Texas death penalty scheme, which required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death penalty-eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. *Jurek v. Texas*, 428 U.S. at 270-76. The concurrence in *Jurek* noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively, and that the statute did "not extend to juries discretionary power to dispense mercy." 428 U.S. at 279 (White, J. concurring); *see also Woodson v. North Carolina*, 428 U.S. at 315 (Rehnquist, J. dissenting); *Roberts v. Louisiana*, 428 U.S. at 359 (White, J. concurring). In *Franklin v. Lynaugh*, the court

reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. 108 S. Ct. at 2330-32 (O'Connor, J. concurring); *accord*, *Penry v. Lynaugh*, 109 S. Ct. at 2947-51.

Arizona, like Florida and Texas, has chosen to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages Arizona's choice of action.

In arguing that Arizona's sentencing procedure is unconstitutional, petitioner asks this Court to hold that a sentencing body should have "unbridled discretion" whether to impose a death sentence. To do so would mean that Eighth Amendment jurisprudence has come full circle since *Furman*. *See McGautha v. California*, 402 U.S. 183 (1971). Petitioner's position would preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion, and should be rejected by this Court.

Petitioner also claims that the net effect of Arizona's "mandatory" capital sentencing scheme, coupled with the "broad" interpretation of the Arizona aggravating factors, is that the death penalty is mandated in almost all cases. Petitioner's assertion is not borne out by the application of the procedure. As of October 30, 1989, there were 709 inmates incarcerated in the Arizona Department of Corrections for "Murder" convictions. Ariz. Rev. Stat. Ann. §§ 13-1104 and -1105. (See Appendix B.) Of the 356 inmates convicted of murder in the first degree since October 1, 1978, only 66 have a death sentence. (*Id.*) Clearly, the end result of Arizona's sentencing procedure

is that Arizona now has a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 238 (White, J. concurring). Petitioner is one convicted murderer Arizona has constitutionally selected.

3. The trial court was not obligated to impose a sentence of death upon petitioner, and there is nothing in the record to suggest otherwise.

Finally, petitioner asserts that the trial court felt obligated to impose the death penalty under Arizona's "mechanistic" death penalty procedure. There is no factual foundation in the record to support petitioner's speculative claim. At the sentencing hearing, the trial court indicated that it had considered all of the mitigating evidence presented, but found "no mitigating circumstances sufficiently substantial to call for leniency." (J.A. at 57.) The trial court thereafter imposed death. (*Id.*) In the sentencing hearing for codefendant Hoover, however, the trial court did not impose death, but opted for a life sentence instead. The trial court exercised its discretion and found the aggravating circumstances in petitioner's case sufficiently substantial to warrant the imposition of death. There was no error.

III.

THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" HAS BEEN SUFFICIENTLY DEFINED TO SATISFY THE REQUIREMENTS OF *MAYNARD V. CARTWRIGHT*.

Petitioner contends that Arizona's aggravating circumstance of "especially heinous, cruel or depraved" is unconstitutionally vague on its face and as applied to

him. *Adamson v. Ricketts*, 865 F.2d at 1029-39. Respondent disagrees.

A. The scope of review by this Court.

A statute is vague and therefore in violation of the Eighth Amendment if it fails to adequately inform the sentencing body "what [it] must find to impose the death penalty." *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858 (1988). Petitioner attempts to use *Maynard* as a vehicle to have this Court review all 61 Arizona cases analyzing the aggravating circumstance of "especially heinous, cruel or depraved" to determine if the Arizona Supreme Court has acted properly in applying the statute. *Maynard* cannot be read so broadly.

In *Maynard*, the trial court did not instruct the jury on what the terms "heinous," "atrocious," or "cruel" meant. The Tenth Circuit reviewed Oklahoma law to determine if the Oklahoma Court of Criminal Appeals had set forth a limiting interpretation of the statute, and concluded that the Oklahoma Court had refused to hold that any one factor must be present for a murder to satisfy the aggravating circumstance. *Cartwright v. Maynard*, 822 F.2d 1477, 1483, 1491 (10th Cir. 1987). The state did not take issue with the reading of Oklahoma law by the Tenth Circuit. *Maynard v. Cartwright*, 108 S. Ct. at 1857. This Court held that the failure of the Oklahoma court to define and limit these terms was in violation of the Eighth Amendment because it did not minimize the "risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858.

Maynard requires that the state must articulate a standard by which it evaluates such circumstances. 108 S. Ct. at 1859. *Maynard* does not authorize wholesale proportionality review of all state court decisions by a federal court to see if the federal court approves of the standard

chosen by the state court. This Court did not affirm the Tenth Circuit because it disagreed with a standard articulated by the Oklahoma court; it affirmed because Oklahoma had never clearly articulated a standard. In Arizona, however, the Arizona Supreme Court has set forth a very specific definition of "especially heinous, cruel or depraved" and what factors are necessary to support a finding. *State v. Gretzler*, 659 P.2d at 13; *State v. Correll*, 715 P.2d at 735. Furthermore, in Arizona, the trial court imposes the sentence; therefore, it is presumed the court knows and applies the law. Finally, the Arizona Supreme Court reviews each case de novo, as a trier-of-fact, to assure the correct application of the aggravating circumstance. *State v. Smith*, 638 P.2d 696, 700-01 (Ariz. 1982).

To determine if the Arizona limitation was misapplied in any one case would require that the record of that case be before the Court. *See Godfrey v. Georgia*, 446 U.S. 420 (1980) (Court reviews facts surrounding aggravating circumstance to determine if it supports finding by Georgia Supreme Court); *cf. Proffitt v. Florida*, 428 U.S. at 255 n.12 (Court reviews other cases to see if state court has abandoned limiting definition). The reasons for the Arizona Supreme Court's factual determinations in other cases are not of constitutional scope and are beyond this Court's ability to review. Because the only record before this Court is petitioner's, this Court may only properly determine if the statute as defined and limited by the Arizona Supreme Court is adequate on its face to inform a trial court what it "must do to impose the death penalty," *Maynard v. Cartwright*, 108 S. Ct. at 1858; and whether, as so defined, it was applied to petitioner so as not to render it unconstitutionally vague, *Godfrey v. Georgia*, 446 U.S. at 432.

In addressing the issue of misapplication, petitioner challenges for the first time the existence of the facts supporting the Arizona Supreme Court's finding of the aggravating factor, claiming that the facts do not show that the victim was scared prior to the shooting.[14] This Court said in *Barclay v. Florida*, 463 U.S. at 947, that federal review of the application of an aggravating circumstance was limited to whether the finding was so "unprincipled or arbitrary as to somehow violate the United States Constitution." The facts clearly support the decision of the Arizona Supreme Court and are not "unprincipled or arbitrary."

B. The law in Arizona.

The Arizona Supreme Court defined the terms "especially heinous, cruel or depraved" as follows:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

[14] Petitioner did not raise the issue whether the facts supported the Arizona Supreme Court's finding of the aggravating factor in the petition for certiorari. (Petition for Writ of Certiorari at 13-16.) Petitioner only argued that in other cases the court did not find the circumstance on facts arguably similar. (*Id.*) Petitioner likewise never contested the facts in the Arizona Supreme Court. (Opening Brief in Arizona Supreme Court at 39-45.) Petitioner merely argued that the facts presented did not legally constitute the aggravating circumstance. (*Id.*) These issues are therefore not properly before this Court. Rule 34.1, United States Supreme Court Rules. Respondent shall address the issue only to demonstrate that the Arizona Supreme Court did not commit "plain error." *Id.*

State v. Knapp, 562 P.2d 704, 716 (Ariz. 1977), *cert. denied*, 435 U.S. 908 (1978). It also stated that the legislature intended to include killings where additional circumstances "set the crime apart from the usual or the norm." *Id.* Recognizing that every murder in a certain sense may be characterized as heinous, cruel, or depraved, it required that the facts show it to be *especially* heinous, cruel, or depraved. *State v. Lujan*, 604 P.2d 629, 636 (Ariz. 1979).

Contrary to the implication proffered by petitioner, this was not the end of the court's defining, refining, and narrowing of the circumstance. By the time the Arizona Supreme Court handed down *State v. Gretzler* in 1983, it had reviewed a sufficient number of cases to crystallize the requirements to establish each prong of the circumstance. The court explained that "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." 659 P.2d at 10. Because the statute is in the disjunctive, if either "cruelty" or "heinous or depraved" is shown, the aggravating circumstance applies. *Id.*

1. Cruelty.

The "cruelty" prong is satisfied only when the prosecution proves beyond a reasonable doubt that the victim consciously suffered mental anguish or physical pain prior to death. *State v. Gretzler*, 659 P.2d at 10. This requirement for "cruelty" has been consistently applied.[15]

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[15] *State v. Vickers*, 768 P.2d 1177 (Ariz. 1989) (cruelty established where the defendant threw flaming liquid upon the

(Continued on following page)

Only a few months after *Gretzler*, the Arizona Supreme Court held that, for the "cruelty" aggravating circumstance to exist, the defendant must either intend to inflict mental anguish or physical pain, or reasonably foresee that he will inflict it. *State v. Adamson*, 665 P.2d 972, 988 (Ariz.), *cert. denied*, 464 U.S. 865 (1983). There has been no post-*Adamson* case where the aggravating circumstance of cruelty has been sustained without evidence that the defendant either intended to inflict mental anguish or physical pain, or should have reasonably foreseen that he would do so. *State v. Smith*, 707 P.2d at 302; *see also Adamson v. Ricketts*, 865 F.2d at 1057 (no post-*Adamson* case has abandoned the cruelty test) (Brunetti, Cir. J. dissenting). (For further explanation of all Arizona cases applying "cruelty," see Appendix C.)

(Continued from previous page)

conscious victim, who ran around his cell in vain trying to extinguish the flames until he died); *State v. Beaty*, 762 P.2d at 524, 529 (mental anguish established where the terrified victim vomited while the defendant held his hand over her mouth prior to raping and murdering her); *State v. LaGrand*, 734 P.2d 563, 578-79 (Ariz.), *cert. denied*, 484 U.S. 872 (1987) (mental anguish and physical pain demonstrated where the defendant bound, gagged, and threatened the bank manager with death, then inflicted 24 stab wounds with a letter opener); *State v. Castaneda*, 724 P.2d 1, 12 (Ariz. 1986) (mental anguish and physical pain established by proof that the defendant repeatedly sodomized a 12-year-old boy, drove him to the desert, forced him to remove his clothes, then stabbed him four times in the chest as he pled for his life, leaving him writhing in pain on a red ant hill); *State v. Correll*, 715 P.2d at 733 (mental anguish proven by facts that conscious victims were uncertain concerning their ultimate fate as defendant drove them into the desert).

Petitioner objects to the application of the cruelty circumstance in his case based on the assertion that, in other cases where other defendants caused their victims to suffer mental anguish, Arizona courts "did not find" the cruelty circumstance. (Petitioner's brief at 46 n.38.) A review of petitioner's cases clearly demonstrates that some of those cases differ procedurally from petitioner's case. In *State v. Rockwell*, at the sentencing hearing, the state requested that the trial court find three aggravating factors and "cruelty" was not one of these. 775 P.2d at 1078. The trial court had no authority to find aggravation not requested by the state. *State v. Murphy*, 555 P.2d 1110, 1112 (Ariz. 1976). Therefore, the Arizona court did not find the murder to be "cruel," because the court was procedurally barred from doing so. This same procedural preclusion is found in some of petitioner's other cases. *State v. Rankovich*, 765 P.2d 518, 519 (Ariz. 1988) (state stipulated before trial that it would not seek the death penalty); *State v. McGuire*, 638 P.2d 1339 (Ariz. 1981) (penalty imposed pursuant to a plea agreement).

Likewise, in some of the other cases cited by petitioner, the opinions do not indicate whether the state sought the cruelty factor; whether the trial court found the cruelty factor, but also found that the mitigation outweighed the aggravation; or whether the trial court found that the state failed to prove the existence of conscious suffering. *State v. Carr*, 743 P.2d 1386 (Ariz. 1987); *State v. Schrock*, 719 P.2d 1049 (Ariz. 1986); *State v. Vaughn*, 708 P.2d 453 (Ariz. 1985); *State v. Nash*, 694 P.2d 222 (Ariz.), *cert. denied*, 471 U.S. 1143 (1985); *State v. Cruz-Mata*, 674 P.2d 1368 (Ariz. 1983); *State v. Ring*, 641 P.2d 862 (Ariz. 1982); *State v. Rhymes*, 628 P.2d 939 (Ariz. 1981); *State v. Watkins*, 614 P.2d 835 (Ariz. 1980); *State v. Austin*, 603 P.2d 502 (Ariz. 1979), *cert. denied*, 446 U.S. 911 (1980);

State v. Ferguson, 579 P.2d 559 (Ariz. 1978); *State v. Cookus*, 563 P.2d 898 (Ariz. 1977). Therefore, petitioner's contention that Arizona courts "did not find" cruelty in these cases cannot be supported.

Of the cases cited by petitioner to show inconsistency, only *State v. Poland*, *State v. Lujan*, and *State v. Watson*, address the findings of cruelty, and in each of these cases the court correctly applied the cruelty test set forth above. In *Poland*, the Arizona Supreme Court held that the state had failed to prove beyond a reasonable doubt that the victims suffered mental anguish because "we know nothing of the circumstances under which the [victims] were held hostage." 645 P.2d at 800. The court did not find that mental suffering could not be the basis of cruelty; it found only that, in *Poland*, the evidence was inconclusive that the victims did consciously suffer. *See also State v. Poland*, 698 P.2d 183 (court reaffirms prior holding that state presented insufficient evidence of cruelty).

In the pre-*Gretzler* case of *Watson*, the victim was shot in the back four times, and there is no indication that the victim saw the defendant or knew he was about to die. 586 P.2d at 1260. Like *Poland*, the evidence in *Watson* was inconclusive whether the victim suffered mental anguish. The Arizona Supreme Court reached the same conclusion about lack of proof of mental suffering in *Lujan*. 604 P.2d at 636. There is nothing in these opinions that would indicate the Arizona Supreme Court has abandoned its "cruelty" test, or applied it in an inconsistent manner.

2. Heinous or depraved.

Contrasted with cruelty, the elements of heinousness and depravity focus upon the defendant's attitude and mental state, as reflected in his words or actions, at or

near the time of the murder. *State v. Ceja*, 612 P.2d 491, 495 (Ariz. 1980). The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing in the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11. Neither of the last two elements, in isolation, will lead to the application of the circumstance. 659 P.2d at 10-12. The Arizona Supreme Court has consistently applied these factors.[16] (For further explanation of all Arizona cases applying "heinous or depraved," see Appendix C.)

Petitioner objects to the application of the "heinous or depraved" circumstance in his case based on the assertion that in other cases where other defendants boasted about their crimes, Arizona courts "did not find" the

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[16] *State v. LaGrand*, 734 P.2d at 578-79 (infliction of gratuitous violence and needless mutilation, plus the senselessness of the killing and the helplessness of the victim); *State v. Wallace*, 728 P.2d at 236-38 (infliction of gratuitous violence after the victims had collapsed; decision to use a baseball bat and pipe wrench in spite of possession of a loaded revolver, and the total senselessness of killing three people he had lived with for 2 years as a family); *State v. Rossi*, 706 P.2d 371, 377 (Ariz. 1985) (defendant used special bullets designed to make bigger holes, subsequently bragged about the murder, and gave a friend three spent bullets as souvenirs); *State v. Lambright*, 673 P.2d 1, 13-14 (Ariz. 1983), *cert. denied*, 469 U.S. 892 (1984) (staging a victory celebration in which killers sang "We Are the Champions" evidenced relishing in the crime); *State v. Zaragoza*, 659 P.2d 22, 28 (Ariz.), *cert. denied*, 462 U.S. 1124 (1983) (murder of 78-year-old mentally impaired woman after rape and robbery was gratuitous violence as defendant could have accomplished criminal goals without killing her).

heinous or depraved circumstance. (Petitioner's brief at 47 n.39.) In *State v. Lamb*, the state did not seek the death penalty, thereby precluding the trial court from finding any aggravating circumstances. 690 P.2d 764, 774 (Ariz. 1984). In other cases cited by petitioner, the opinions do not indicate whether the state sought the aggravating circumstance; whether the trial court found the circumstance, but found mitigation to outweigh the aggravation; or whether the court found the state presented insufficient evidence to prove the existence of the circumstance. *State v. Tucker*, 759 P.2d 579 (Ariz. 1988); *State v. Williams*, 650 P.2d 1202 (Ariz. 1982); *State v. Hensley*, 691 P.2d 689 (Ariz. 1984). Of the cases cited by petitioner for inconsistent application, only *State v. Graham*, 660 P.2d 460 (Ariz. 1983), and *State v. Madsen*, 609 P.2d 1046 (Ariz. 1980), address the application of the aggravating circumstance of "heinous or depraved," and a reading of those cases does not show inconsistent application.

In *Graham*, the Arizona Supreme Court, in applying the "heinous or depraved" test, found "no compelling evidence" that Graham had the requisite mental attitude as reflected by his words or actions. 660 P.2d at 463. The only evidence presented was a statement by a codefendant that Graham stated the victim "squealed like a rabbit" when Graham shot him. *Id.* Graham denied making the statement. *Id.* Even if Graham had made the statement, the Arizona Supreme Court was not convinced beyond a reasonable doubt that Graham relished in the crime, given Graham's impaired mental condition. *Id.*[17]

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[17] The Arizona Supreme Court specifically addressed *Graham* in petitioner's appeal. *State v. Walton*, 769 P.2d at 1033. The court noted that the statement that the victim "squealed like a rabbit" could support a finding of "depravity," but did not in *Graham* based on other evidence in the record. *Id.*

In *Madsen*, a pre-*Gretzler* decision, the trial court found the crime to be depraved based on the deliberate nature and planning of the murder. The Arizona Supreme Court reversed, holding such evidence went to premeditation, and did not set *Madsen* apart from any other premeditated homicide. 609 P.2d at 1052. There is nothing in the opinion that would indicate that the state sought the finding of depravity based on Madsen's "boasting." The court reaffirmed the holding of *Madsen* in *State v. Gretzler*, 659 P.2d at 12.

A review of the cases cited by petitioner does not indicate that the Arizona Supreme Court has abandoned its limiting definition, or that it has inconsistently applied the depravity aggravating circumstance. The Arizona Supreme Court has defined the circumstance to satisfy this Court's directives in *Godfrey* and *Maynard*.

C. The circumstance was correctly applied to petitioner.

In the Arizona Supreme Court, petitioner did not dispute that the trial court applied the above-cited standards to him, but claimed that the facts as presented did not constitute the "heinous, cruel or depraved circumstance." (Opening Brief in Arizona Supreme Court at 39-45.) The facts clearly support the findings of the Arizona Supreme Court. It is without question that the victim suffered an excruciatingly "cruel" death. Petitioner and his codefendants accosted and robbed Powell in Tucson. (J.A. at 18-19.) Powell was ordered to get into his own car and forced to ride out in the desert to a remote location known as Gates Pass. (J.A. at 19-20.) Powell pled with his abductors to spare him and promised he would not tell anyone. (J.A. at 22-23.) Upon arrival at Gates Pass, Powell was placed on the ground while his abductors

debated his fate. (J.A. at 23-24.) Finally, codefendant Hoover stated that he did not care what petitioner did with Powell, "just hurry." (J.A. at 24.) Petitioner then told the codefendants to turn up the radio. (J.A. at 24-25.) Thereafter, petitioner marched Powell into the desert, placed him on the ground, put his boot on the back of Powell's neck, placed his gun at the back of Powell's head, and shot the young Marine. (J.A. at 15, 28, 31.)

Petitioner's counsel takes issue with these facts, claiming that there is no evidentiary basis upon which to conclude that Powell "expressed fear" or "begged for his life to Petitioner, or anyone, at that time, or anytime." (Petitioner's brief at 45 n.35, 46 n.36.) However, the words of petitioner during the taped interview upon arrest refute this contention:

> All that I remember is the guy [Powell] was, the guy told Rob, he goes, ***'don't hurt me, I won't tell anybody, take the car and leave.'***

(Exhibit 31, admitted 12/15/86.) A plain inference from this statement, and from the testimony from codefendant Ramsey that Powell appeared scared, is that Powell was fearful and begged for his life. Thus, the findings of the court were not "unprincipled or arbitrary" and are supported by the record. *Barclay v. Florida*, 463 U.S. at 947. The mental anguish that Powell must have experienced is comparable to that described by Justice White in his dissent in *Godfrey*, where he discussed the mental anguish that a murder victim must suffer when he becomes aware of his impending death.

> What terror must have run through [his] veins as [he] . . . came to terms with the imminence of [his] own [demise]. Was this not torture? And if this was not torture, can it honestly be said that petitioner did not exhibit a 'depravity of mind'

> in carrying out this cruel drama to its mischievous and murderous conclusion?

446 U.S. at 451 (White, J. dissenting). The Arizona Supreme Court did not err.

CONCLUSION

Respondent prays that this Court will affirm the decision of the Arizona Supreme Court on the issues presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

Those states in which aggravating circumstances are determined at the penalty phase:

Ala. Code § 13A-5-49
Ariz.Rev.Stat.Ann. § 13-703(F)
Ark.Stat.Ann. § 41-1303
Cal. Penal Code § 190.2
Colo.Rev.Stat. § 16-11-103(6)
Conn.Gen.Stat. § 53A-46A(h)
Del. Code Ann. § 4209
Fla.Stat. § 921.141(5)
Ga. Code Ann. § 17-10-30(b)
Idaho Code § 19-2515(g)
Ill.Rev.Stat. Ch. 38, Para. 9-1(b)
Ind. Code § 35-50-2-9(b)
Ky.Rev.Stat. § 532.025(2)(A)
La. Code Crim. Pro. Art. 905.4
Md. Code Ann. Art. 27, § 413(d)
Ms. Code Ann. § 99-19-101(5)
Mo.Rev.Stat. § 565.032(2)
Mont. Code Ann. § 46-18-303
Neb.Rev.Stat. § 29-2523(1)
Nev.Rev.Stat. § 200.033
N.H.Rev.Stat.Ann. § 630: 5(II)(A)
N.J.Rev.Stat. § 2C: 11-3c(4)
N.M.Stat.Ann. § 31-20A-5
N.C.Gen.Stat. § 15A-2000(e)
Okla.Stat. § 701.12
Pa.Cons.Stat. 42 § 9711(d)
S.C. Code Ann. § 16-3-20(C)(A)
S.D. Codified Laws Ann. § 23A-27A-1
Tenn. Code Ann. § 39-2-203(i)
Wyo.Stat. § 6-2-102(h)

APPENDIX B

Inmates Incarcerated for Homicide
Under Arizona's New Criminal Code,*
October 30, 1989**

Classification	*Number of Inmates*	
§ 13-1105 (First degree)	356	
§ 13-1104 (Second degree)	353	
§ 13-1103 (Manslaughter)	290	
§ 13-1102 (Negligent Homicide)	44	
	1043	Total

Of the 356 inmates incarcerated for first degree murder under the new criminal code, 66 are under a death sentence.***

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* Arizona Revised Statutes Annotated §§ 13-1101 through 13-1105, effective October 1, 1978

** Source: Arizona Department of Corrections, Planning Statistics

*** There are an additional 16 death row inmates who were convicted of crimes occurring prior to the October 1, 1978 effective date of the new code and therefore are not included in this appendix. [Source: Office of the Arizona Attorney General, *Profiles of Death Row Inmates Arizona State Prison* (Rev. Feb. 1, 1989).]

APPENDIX C

KEY:

a. Court did not distinguish between "cruelty" and "heinous or depraved"
b. Appellate court did not address facts to support trial court's findings
c. Appellate court did not specifically list Gretzler factors
d. Facts to support circumstance not found by trial court
e. Gretzler factors indicating heinousness or depravity
   1. Relishing of the murder
   2. Infliction of gratuitous violence above that necessary to complete objectives of the crime
   3. Mutilation of the corpse
   4. Senselessness of the crime
   5. Helplessness of the victim

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(1) State v. Blazak 560 P.2d 54 (1977)	No	[b]Yes 560 P.2d at 61 n.3	[b]Yes 560 P.2d at 61 n.3	Pre-Gretzler	Knapp, 562 P.2d at 716 Ceja, 565 P.2d at 1278
(2) State v. Knapp 562 P.2d 704 (1977)	No	[a]Yes 562 P.2d at 716	[a]Yes 562 P.2d at 716	Pre-Gretzler	
(3) State v. Ceja 565 P.2d 1274 (1977)	No	[a]Yes 565 P.2d at 1278	[a]Yes 565 P.2d at 1278	Pre-Gretzler	Ceja, 612 P.2d at 495-96 Gretzler, 659 P.2d at 11
(4) State v. Bishop 576 P.2d 122 (1978)	No	[b]Yes 576 P.2d at 123	[b]Yes 576 P.2d at 123	Pre-Gretzler	
(5) State v. Watson 586 P.2d 1253 (1978)	No	[a]No 586 P.2d at 1260	[a]No 586 P.2d at 1260	Pre-Gretzler	
(6) State v. Brookover 601 P.2d 1322 (1979)	No	[a]No 601 P.2d at 1325	[a]No 601 P.2d at 3225	Pre-Gretzler	
(7) State v. Lujan 604 P.2d 629 (1979)	No	No 604 P.2d at 636	No 604 P.2d at 637	Pre-Gretzler	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(8) State v. Mata 609 P.2d 48 (1980)	No	[b]Yes 609 P.2d at 57	Yes 609 P.2d at 57	Pre-Gretzler	
(9) State v. Madsen 609 P.2d 1046 (1980)	No	Not addressed	No 609 P.2d at 1052	Pre-Gretzler	
(10) State v. Steelman 612 P.2d 475 (1980)	No	[a]Yes 612 P.2d at 482	[a]Yes 612 P.2d at 482	Pre-Gretzler	
(11) State v. Ceja 612 P.2d 491 (1980)	No	No 612 P.2d at 495	Yes 612 P.2d at 495-96	Pre-Gretzler	Opinion deleted cruelty from finding in Ceja, 565 P.2d at 1278
(12) State v. Clark 616 P.2d 888 (1980)	No	No 616 P.2d at 896	Yes 616 P.2d at 896-97	Pre-Gretzler	Gretzler, 659 P.2d at 11
(13) State v. Bishop 622 P.2d 478 (1981)	No	No 622 P.2d at 481	Yes 622 P.2d at 481	Pre-Gretzler	Gretzler, 659 P.2d at 11
(14) State v. Vickers 633 P.2d 315 (1981)	No	Not addressed	Yes 633 P.2d at 324	Pre-Gretzler	Gretzler, 659 P.2d at 11
(15) State v. Tison 633 P.2d 335 (1981)	No	Yes 633 P.2d at 352	Yes 633 P.2d at 352	Pre-Gretzler	See also State v. Tison 633 P.2d 355 (1981) Gretzler, 659 P.2d at 11
(16) State v. Smith 638 P.2d 696 (1982)	No	[ab]Yes 638 P.2d at 697	[ab]Yes 638 P.2d at 697	Pre-Gretzler	Gretzler, 659 P.2d at 11
(17) State v. Ortiz 639 P.2d 1020 (1982)	Yes 639 P.2d at 1031	No 639 P.2d at 1035	Yes 639 P.2d at 1035	Pre-Gretzler	Gretzler, 659 P.2d at 11

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(18) State v. Blazak 643 P.2d 694 (1982)	No	No 643 P.2d at 700	No 643 P.2d at 700	Pre-Gretzler	Opinion deleted cruelty and depravity from finding in Blazak, 560 P.2d at 61 n.3
(19) State v. Poland 645 P.2d 784 (1982)	No	No 645 P.2d at 800	No 645 P.2d at 800	Pre-Gretzler	
(20) State v. Woratzeck 657 P.2d 865 (1983)	No	No 657 P.2d at 870	Yes 657 P.2d at 870	Pre-Gretzler	
(21) State v. Gretzler 659 P.2d 1 (1983)	Yes 659 P.2d at 9	Yes 659 P.2d at 12	Not addressed 659 P.2d at 12		
(22) State v. Zaragoza 659 P.2d 22 (1983)	Yes 659 P.2d at 27	No 659 P.2d at 28	Yes 659 P.2d at 28	[c]2, 4, 5 659 P.2d at 28	
(23) State v. Gerlaugh 659 P.2d 642 (1983)	No	[ab]Yes 659 P.2d at 642	[ab]Yes 659 P.2d at 642	b	
(24) State v. Graham 660 P.2d 460 (1983)	No	No 660 P.2d at 463	No 660 P.2d at 463–64	Not factor 1 660 P.2d at 463	Walton, 769 P.2d at 1033
(25) State v. Jeffers 661 P.2d 1105 (1983)	Yes 661 P.2d at 1131	No 661 P.2d at 1130	Yes 661 P.2d at 1130–31	1, 2 661 P.2d at 1131	
(26) State v. Gillies 662 P.2d 1007 (1983)	No	Yes 659 P.2d at 1019–20	Not addressed		
(27) State v. McDaniel 665 P.2d 70 (1983)	No	Yes 665 P.2d at 82	Not addressed		

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(28) State v. Adamson 665 P.2d 972 (1983)	No	Yes 665 P.2d at 988–89	Not addressed		
(29) State v. Richmond 666 P.2d at 57 (1983)	Yes 666 P.2d at 64–65	No 666 P.2d at 64	Yes, by minority of court 666 P.2d at 64	2,3 by minority of court 666 P.2d at 64	
(30) State v. Harding 670 P.2d 383 (1983)	Yes 670 P.2d at 398	No 670 P.2d at 399	Yes 670 P.2d at 399–40	2, 3, 5 666 P.2d at 400	
(31) State v. Lambright 673 P.2d 1 (1983)	Yes 673 P.2d at 12	Yes 673 P.2d at 13	Yes 673 P.2d at 13	1 673 P.2d at 13	
(32) State v. Smith 673 P.2d 17 (1983)	Yes 673 P.2d at 17	Yes 673 P.2d at 23	No 673 P.2d at 23–24		See Lambright, 673 P.2d 1
(33) State v. Summerlin 675 P.2d 686 (1983)	No	Yes 675 P.2d at 696	Yes 675 P.2d at 696	1, 2, 3, 4, 5 675 P.2d at 696	
(34) State v. McCall 677 P.2d at 920 (1984)	No	Yes 677 P.2d at 934	Yes 677 P.2d at 934–35	2, 3, 4 677 P.2d at 934–35	
(35) State v. Libberton 685 P.2d 1284 (1984)	No	Yes 685 P.2d at 1291	Not addressed		
(36) State v. James 685 P.2d 1293 (1984)	No	Yes 685 P.2d at 1299	Yes 685 P.2d at 1299	1, 2, 4 685 P.2d at 1299	
(37) State v. Fisher 686 P.2d 750 (1984)	No	Not addressed	Yes 686 P.2d at 775	[c]2, 4, 5 686 P.2d at 775	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(38) State v. Chaney 686 P.2d 1265 (1984)	No	Yes 686 P.2d at 1282		[c]2, 4, 5 686 P.2d at 1282-83	
(39) State v. Harding 687 P.2d 1247 (1984)	No	Yes 687 P.2d at 1256	Not addressed		
(40) State v. Smith 687 P.2d 1265 (1984)	No	Not addressed	[d]No 687 P.2d at 1267		
(41) State v. Villafuerte 690 P.2d 42 (1984)	No	No 690 P.2d at 50	Yes 690 P.2d at 50	2, 4, 5 690 P.2d at 50	
(42) State v Gillies 690 P.2d 54 (1984)	No	Yes 690 P.2d at 67	Yes 690 P.2d at 67	2 690 P.2d at 67	
(43) State v. Gillies 691 P.2d 655 (1984)	Yes 691 P.2d at 661	Yes 691 P.2d at 660-61	Yes 691 P.2d at 661-62	[c]1, 2, 4 691 P.2d at 661-62	
(44) State v. Carriger 692 P.2d 991 (1984)	No	Yes 692 P.2d at 1009	Yes 692 P.2d at 1009	[c]2, 5 692 P.2d at 1009	
(45) State v. Poland 698 P.2d 183 (1985)	No	No 698 P.2d at 200	Not addressed		
(46) State v. Roscoe 700 P.2d 1312 (1984)	Yes 700 P.2d at 1326	Yes 700 P.2d at 1326	Yes 700 P.2d at 1326	[c]2, 4, 5 700 P.2d at 1326	
(47) State v. Martinez-Villareal 702 P.2d 670 (1985)	No	Not addressed	Yes 702 P.2d at 679-80	1, 4, 5 702 P.2d at 680	
(48) State v. Bracy 703 P.2d 464 (1985)	Yes 703 P.2d at 480	Yes 703 P.2d at 481	Yes 703 P.2d at 481-82	2, 3, 4, 5 703 P.2d at 482	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(49) State v. Rossi 706 P.2d 371 (1985)	Yes 706 P.2d at 378	Yes 706 P.2d at 377	Yes 706 P.2d at 377-78	1, 2, 4, 5 706 P.2d at 377-78	
(50) State v. Smith 707 P.2d 289 (1985)	Yes 707 P.2d at 298	No 707 P.2d at 302	No 707 P.2d at 301-02	None found 707 P.2d at 301-02	
(51) State v. Johnson 710 P.2d 1050 (1985)	No	Not addressed	No 710 P.2d at 1055-56	4 710 P.2d at 1056	
(52) State v. Correll 715 P.2d 721 (1986)	No	Yes 715 P.2d at 733	Yes 715 P.2d at 7	4, 5 715 P.2d at 734	
(53) State v. Castaneda 724 P.2d 1 (1986)	Yes 724 P.2d at 12	Yes 724 P.2d at 12	Not addressed		
(54) State v. Wallace 728 P.2d 362 (1986)	Yes 728 P.2d at 236	No 728 P.2d at 237	Yes 728 P.2d at 237-38	2, 4 728 P.2d at 237-38	
(55) State v. La Grand 734 P.2d 563 (1987)	No	Yes 734 P.2d at 578	Yes 734 P.2d at 578-79	2, 3, 5 734 P.2d at 578-79	
(56) State v. Moormann 744 P.2d 679 (1987)	No	Yes 744 P.2d at 688	Not addressed		
(57) State v. Beaty 762 P.2d 519 (1988)	No	Yes 762 P.2d at 529	Yes 762 P.2d at 529-30	2, 4, 5 762 P.2d at 530	
(58) State v. Vickers 768 P.2d 1177 (1989)	Yes 768 P.2d at 1188	Yes 768 P.2d at 1190-91	Yes 768 P.2d at 1190-91	[c]1, 4, 5 768 P.2d at 1190-91	
(59) State v. Walton 769 P.2d 1017 (1989)	Yes 769 P.2d at 1030	Yes 769 P.2d at 1032-33	Yes 769 P.2d at 1033	1 769 P.2d at 1033	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(60) State v. Fulminante 778 P.2d 602 (1989)	Yes 778 P.2d at 619	Yes 778 P.2d at 620	Yes 778 P.2d at 621	4, 5 778 P.2d at 621	
(61) State v. Marlow 1989 Ariz. Lexis 192 (1989)	Yes 1989 Ariz. Lexis 192 at 17-18	Not addressed	Yes 1989 Ariz. Lexis 192 at 17-18	[c]2 1989 Ariz. Lexis 192 at 17-18	

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No. 88-7351 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

PETITIONER'S REPLY BRIEF

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RESTATEMENT OF THE FACTS

Respondent's recitation of the facts of this case is highly editorialized. It recounts actions never described by a witness; it identifies Petitioner Walton as the instigator of events for which the testimony does not assign responsibility.[1]

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[1]Respondent's Statement of the Case begins by asserting that "petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk ...." Resp. Brief 1. The cited testimony--Ramsey's--neither says nor suggests "petitioner asked" the others to commit this crime; when pressed by the prosecutor to specify who talked about these plans, Ramsey said "all of us." J.A. 10. Respondent dramatizes the confrontation between Petitioner and Mr. Powell, saying "Petitioner confronted Powell, cocked his gun, and ordered him to empty his pockets ...." Resp. Brief 1. The cited parts of the record contain no testimony Petitioner "cocked his gun". Ramsey did testify that Mr. Powell put his belongings on top of the car and lay on the ground; but when asked if someone told him to do that, she said "I think he just done that automatically." J.A. 19.

Respondent says "Petitioner put Powell in the back seat ...." Resp. Brief 1. Ramsey did say Mr. Powell got in the back seat of the car with Petitioner; when asked who told him to do that, she testified "I don't remember." J.A. 19.

It consistently strains the record in an effort to conceal how far the state courts stretched Arizona's death penalty law in applying it to Petitioner.

This practice likely explains the important divergences of the Arizona Supreme Court's opinion from the evidentiary record, which are pointed out in our opening brief. See Pet. Opening

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Respondent says that, at Gates Pass "Powell was ordered out of the car and forced to lay on the ground." Resp. Br. 1. Ramsey's testimony included no references to any "order" or "force"; she said "I guess he just got back down on the ground, I don't remember. I don't remember seeing him standing." J.A. 24. Respondent says that "Petitioner and Hoover then began arguing in Powell's presence about what to do with him," and "[e]ventually, Hoover stated he did not care what petitioner did with Powell." Resp. Br. 1. Ramsey described no such prolonged discussion, and she specified that "Rob and Mike were just arguing about what they were going to tie him up with or whatever, and Rob said he didn't care what he tied him up with, just hurry ...." J.A. 24.

Respondent says "Petitioner boasted that he never saw a 'man pee in pants before.'" Resp. Br. 2. Ramsey described no "boasting;" the whole of her description was this sentence: "He said he never seen a man pee in his pants before." J.A. 30.

Brief 46 n.36. Looseness with the facts is troubling in any case where life is at stake. In a case where the State is seeking to support a death judgment on the basis of facts found outside the traditional process of trial by jury--facts found primarily by an appellate court--it is particularly insidious. The validity of that judgment, and of part of the statute on which it was based, may turn on the precise interpretation of that statute, as evidenced by its application to the facts of the case at hand.[2] The kind of shading of the record that pervades Respondent's Brief is particularly inappropriate in this context.

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[2]In this regard, we discuss one of Respondent's most striking and blatant misrepresentations of the record, made in its attempt to justify the Arizona Supreme Court's undeniable misstatement that Mr. Powell "begged for his life" at the scene of the homicide, in Part III, below.

I. RESPONDENT'S ARGUMENT IMPERMISSIBLY ALLOWS THE MERE LABEL "AGGRAVATING CIRCUMSTANCES" TO CONTROL THE REACH OF THE SIXTH AMENDMENT RIGHT TO JURY TRIAL.

Respondent acknowledges that the Arizona statutory scheme "does not provide for jury determination of the ... circumstances necessary to impose death." Resp. Br. 5. It makes no attempt to square such a statute with the concept of "trial by jury" understood by the framers of the Sixth Amendment, or the notions of "due process of law" held by the authors of the Fourteenth Amendment. Instead, it argues that the statute is exempt from the Sixth Amendment because it uses the phrase "aggravating circumstances" to describe the particular factual findings it withdraws from the jury, and because it resembles the Florida death sentencing scheme that this Court has previously upheld. We will answer those points in turn.

A. The "Aggravating Circumstance" Label.

If Respondent's argument is right, it is sufficient to eliminate the right to trial by jury that a State has labeled the factual elements that distinguish its greater crimes from lesser ones--murder, for example, from assault--as "aggravating circumstances," and has called the proceeding at which they are adjudicated a "sentencing hearing." The Court cannot uphold the Arizona statute without condoning this result. For if a State can take from the jury factual issues which are the basic ingredients of actus reus and mens rea, facts that must be found to render the defendant legally eligible for the qualitatively more severe punishment of death, the States can do the same thing for any element of any serious crime. Respondent has suggested no limiting principle, and we can conceive of none.

Constitutional rights in a federal system must turn on substance, not form. There is nothing talismanic about labeling a fact an "aggravating circumstance" or an "element of the offense." Nothing in the Sixth or Fourteenth Amendments attaches significance to such generic legal phrases.[3] A constitutional system must look beyond labels to the actual function served by a particular fact finding under state law, to determine what process is due in making it.

The substantive distinction that Respondent's argument ignores is between a purely factual determination prescribed by

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[3]The phrase "element of the offense" has no fixed meaning, in Arizona or any other state of which we are aware. Nowhere do Arizona's statutes define that phrase, or denominate any particular term used in their definition of crimes as an "element" of the criminal offense. The term "element" is a generic one, which can be applied as accurately to the statutory aggravating circumstances listed in A.R.S §13-703F, as to any other fact which Arizona law makes prerequisite to criminal punishment.

state law as the necessary condition of a defendant's eligibility for a more severe range of sentences including death, and the "reasoned moral response to the defendant's character and crime," see Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) that is the sentencing decision itself. When this Court held that the latter decision on the appropriate sentence to be imposed may be left to judges in capital cases, it did so by analyzing the nature of the decision, Spaziano v. Florida, 468 U.S. 447 (1984), in terms that contrasted sharply with the kind of determination of "guilt or innocence," id. at 458, which has always been the province of a jury.

Arizona has crossed the constitutional line here. No substantive distinction relevant to the purposes of the Sixth Amendment can be made between the determination that Jeffrey Walton acted in an "especially heinous, cruel, or depraved"

manner, and the determinations of mens rea that are always left to juries in other types of criminal cases--determinations that, for example, a homicide was "malicious" or an assault was committed with "intent to maim" or a motor vehicle was operated with a "wanton disregard for human life." The nature of the factual issues is the same. So is their source--a definitional component of the applicable state criminal statute--the procedures for finding the facts, and the significance of the facts to the range of available punishments.

Arizona is, of course, free to "divide up [its trial procedures] ... any way it wishes, and employ whatever terminology it desires, for nonconstitutional purposes." Mistretta v. United States, 109 S.Ct. 647, 681 (1989) (dissenting opinion of Justice Scalia). But it is necessarily this Court's function to determine whether the

factual issues its law defines are ones to which the Sixth Amendment guarantee of "trial ... by jury" applies. Ibid. By every substantive measure, it must apply here.

B. The Court's Florida Decisions.

Respondent overreads the Court's decisions approving the Florida statute and glosses over the very real differences between what are called "aggravating circumstances" under Florida and Arizona law.

The Florida statute does not say that "[i]f the trial court does not find any of the listed aggravating factors, 'the court shall impose a sentence of life imprisonment.' Fla.Stat.Ann. §921.141(3)." Resp. Br. 10. Rather, the questions posed by Florida law--first to the jury, then to the judge--are always phrased in terms of whether "sufficient" aggravating circumstances exist. Fla.Stat.Ann. §921.141(2)(a)

and (3)(a).[4] That is one of the "considerations" that go into the jury's recommendation, Fla.Stat.Ann. §921.141(2)(c), and into the final decision of the judge, who is permitted to "enter a sentence of life or death" "after weighing the aggravating and mitigating circumstances." Fla.Stat. Ann. §921.141(3). Thus, in language and effect, Florida's aggravating circumstances bear no resemblance to the traditional understanding of an element of an offense. Their core function is the facilitation of judicial review, in order to avoid arbitrariness and promote regularity in the imposition of capital punishment. See State v. Dixon, 283 So.2d 1, 8 (Fla.

[4]For the Court's convenience, we have set out the relevant provision of Florida law, Fla. Stat. Ann. §921.141 (1985), as an Appendix to this Brief.

1973).[5] Elements of offenses are found either to exist or not to exist; they are the not found to be present in "sufficient" or "insufficient" amounts. Elements of an offense are not "considerations;" they are the threshold requirement for placing a defendant in a category subject to the punishment prescribed by law for a given criminal act.

Arizona's "aggravating circumstances" have all of the characteristics of elements of an offense.[6] The statute requires the

[5]As construed by the Florida courts under compulsion of the Eighth Amendment, the Florida aggravating factors have also evolved to set a threshold for imposition of the death sentence. See Barclay v. Florida, 463 U.S. 939, 960 (1983) (concurring opinion of Justice Stevens). But that function is incidental to the one prescribed by the Florida statute--the principal consideration governing the process due with respect to a given factual finding. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 119-23 (1975).

[6]This Court did not hold otherwise in Poland v. Arizona, 476 U.S. 147 (1986). Although Fifth and Sixth Amendment analysis may diverge on such points, see Spaziano v. Florida, supra, 468 U.S. at 458-59, Poland

court to determine only "the existence or nonexistence" of the statutorily listed aggravating facts. A.R.S. §13-703E. If "one or more" of these facts are found, the defendant is death-eligible, and the burden shifts to him to establish grounds for "leniency." A.R.S. §13-703E. The sentencing court is not authorized to reexamine whether that factor is

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undoubtedly would have been decided exactly the same way if it had involved a non-capital offense which could be established by alternative parallel elements, instead of a capital offense which could be made out by proof of alternative aggravating circumstances. Just as "the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)," Poland v. Arizona, supra, 476 U.S. at 156, the failure to find any particular element of a criminal offense that can be proved in alternative ways does not constitute "[a] verdict of not guilty, [which] ... absolutely shields the defendant from retrial." Tibbs v. Florida, 457 U.S. 31, 41 (1982). Poland thus compels no conclusion that there is a distinction between Arizona's "aggravating circumstances" and the elements of an ordinary criminal offense, for any constitutional purpose.

"sufficient" to warrant death.[7] The finding of that factor is not merely a "consideration"; it is both necessary and sufficient to make the defendant guilty of a crime punishable by the death penalty.

By failing to distinguish the dissimilar functions played by "aggravating circumstances" in Arizona and Florida, Respondent misapplies the Court's cases in this area. The Court has held that judges may make and review the ultimate capital sentencing decision--"a determination of the appropriate punishment to be imposed on an individual." Spaziano v. Florida, 468 U.S. at 459. It therefore does no violence to the Sixth Amendment to say, as the Court did in Hildwin, that a trial judge may record the facts that he included in the balance in deciding between life and death,

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[7]Respondent's contrary suggestion that the trial judge can assess the sufficiency of aggravation to warrant death, Resp. Br. 29, 33, is answered in Part II, below.

for the purpose of facilitating appellate review of that decision. See Gardner v. Florida, 430 U.S. 349, 360-61 (1977).[8] And of course the Sixth Amendment has nothing to say about whether the State uses a judge or a jury to make the Eighth Amendment culpability finding required by Enmund v. Florida, 458 U.S. 782 (1982). See Cabana v. Bullock, 474 U.S. 376, 386 (1986). But the observation that those findings may

[8]Respondent places great emphasis on the fact that one of the aggravating factors ultimately relied on to explain the death sentence in Spaziano was one not placed before the jury in that case, Resp. Br. 11, a fact the Court noted only in passing. If no evidence of any aggravating circumstance had been placed before Spaziano's jury, his case would have more closely resembled the Arizona statutory scheme. But all that actually happened in Spaziano is that the judge gave an additional statutorily-based reason for imposing a death sentence on a defendant he had previously found death-eligible on the basis of another aggravating circumstance of which there was evidence before the jury. Compare Zant v. Stephens, 462 U.S. 862 (1983). And the additional reason he gave involved a prior conviction of the defendant, not a fact about the offense. Cf. State v. Quinn, 290 Ore. 383, 623 P.2d 630, 643 (1981).

resemble, and even overlap, the factual elements demanded by state law to bring the defendant's crime within a category of offenses subject to the death penalty, does not deprive the defendant of the jury-trial rights that must attach to the latter elements if the Sixth Amendment is to have any practical meaning in capital cases.

II. RESPONDENT IGNORES THE MANNER IN WHICH EACH ASPECT OF ARIZONA'S STATUTORY PRESUMPTION OF DEATH CONTRIBUTES TO THE UNACCEPTABLE RISK OF ERRONEOUS DEATH SENTENCING.

The gloss placed by Respondent on the Arizona death sentencing statute bears little resemblance to the manner in which the statute operates in fact, in several respects.

Generally, the multi-step process Respondent describes--wherein factfinding is followed by weighing which is followed by the ultimate sentencing decision, see Resp. Br. 16-17, 25--is more conceptual than real. Most Arizona cases in which

death is imposed actually proceed much as Petitioner's did: a single sentencing order is issued which lists the aggravating factors found, states in a more or less conclusory manner that mitigating circumstances have been considered and found not to be "sufficiently substantial to call for leniency," and concludes that the defendant is "therefore" sentenced to death. See J.A. 56-58, 59-69.[9]

Respondent's representation that the Arizona Supreme Court has imposed a requirement that "[i]f the trial court rejects mitigating evidence, it must explain its reasons for doing so," Resp.

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[9]Significantly, the trial court's sentencing decision was read immediately after the arguments of counsel ended; no recess or other event intervened. The Joint Appendix does not clearly indicate this; the apparent break in the proceedings it reflects (at pages 55-56) does not occur in the actual transcript, which shows that immediately after the prosecutor concluded his argument (with the words "death penalty," J.A. 55) the court began announcing its decision (by saying "Mr. Walton, ..." J.A. 56).

Br. 17, is even not even theoretically accurate. The case which Respondent cites for this proposition, State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985), contains only the most general dictum "that the better practice is for the trial court to place, on the record, a list of all factors offered by the defendant in mitigation and then explain his reasons for accepting or rejecting them." 708 P.2d at 731 (emphasis added). That suggestion has never had the force of law in Arizona. Both before Leslie and since, the Arizona Supreme Court has rejected arguments that it was reversible error for a trial court not to enter such findings. See State v. Vickers, 129 Ariz. 506, 633 P.2d 315, 325 (1981); State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 533 (1988); State v. McCall, 160 Ariz. 119, 770 P.2d 1165, 1171 (1989). Again, this case well illustrates the prevalent Arizona practice of making only the most

general statement that mitigating circumstances have been "considered" and found insufficient to "call for leniency." J.A. 56-7.

Respondent acknowledges Arizona's mandatory presumption of death only in its starkest form: "[w]here one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed." Resp. Br. 29. Respondent largely ignores the broader effect that the Arizona Supreme Court has repeatedly given the presumption, in this case and others, requiring that "aggravating circumstance[s] [be] outweighed by the mitigating circumstance[s]," State v. Brookover, 124 Ariz. 38, 601 P.2d 1322, 1325 (1979), in order to permit a sentence less than death.[10]. Conversely, Respondent invents

[10]See, e.g., J.A. 94; State v. Gretzler, supra, 659 P.2d at 13-14; State v. Moorman, 154 Ariz. 578, 744 P.2d 679,

the notion that Arizona law "clearly" allows the trial court to "determine the weight to be given an aggravating factor." Resp. Br. 29 n.9. The cases cited to support that proposition do not; instead, they state that a defendant "may offer evidence of the circumstances of the crime as potentially mitigating evidence under §13-703(G)." State v. Romanowsky, 1989 Ariz. Lexis 183, at 33 n.9 (1989) (emphasis added). No Arizona cases hold that an aggravating circumstance, once found, is entitled to more or less weight because of the evidence supporting it.[11] And,

688 (1987); State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, 579 (1987). At one point in its Brief, Respondent appears--possibly inadvertently--to say that the statutory balance is the opposite of this, requiring death only where "aggravating circumstances outweigh the mitigation" Resp. Br. 31 n.10. That is clearly not Arizona law.

[11]We can find nothing relevant to Respondent's argument on this point in State v. Gillies, 135 Ariz. 500, 662 P.2d 1007, 1018 (1983). State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828, 849 (1981), says and holds only that extrinsic evidence

indisputably, Arizona law does not allow trial judges to discount the weight of aggravating circumstances in the only situation where doing that could make a real difference: by holding that, despite the absence or insufficiency of mitigation, a particular aggravating circumstance is not enough to warrant death.[12]

Finally, the Arizona Supreme Court's sporadically-conducted "independent review," referred to in Respondent's Brief (at 30), is governed by the same statutory presumption of death.[13] In Petitioner's

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may be "received by the sentencing court to establish the existence of the second aggravating circumstance under our death penalty statute...." (emphasis added).

[12]As noted in the Appendix to our Opening Brief, a number of other States do allow this, by statute and, increasingly, by caselaw. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Menedez v. State, 419 So.2d 312 (Fla. 1982); Keeton v. State, 724 S.W.2d 58 (Tex. Cr. App. 1987).

[13]In Petitioner's case, like many others, it is not totally clear what kind of an independent review--as opposed to a determination of "whether the trial judge

case, for example, appellate review was conducted by applying the presumption: the Court's specific and general conclusions in affirming were that there were "no mitigating circumstances sufficient to call for lenience in sentencing." J.A. 104; see

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erred in his special verdict on the aggravating and mitigating findings," J.A. 96--the Arizona Supreme Court conducted. The Arizona court has indicated that its review is sometimes conducted silently, without any explicit statement in the decision that the review has even occurred. See State v. Tison, 142 Ariz. 446, 690 P.2d 747, 751 (1984). Where it has set forth a review process, it has given varying descriptions of what standards have governed it. See, e.g., State v. Gretzler, supra, 659 P.2d at 14 (reversal of death sentence permitted only where death sentence "erroneously imposed"); State v. Adamson, 136 Ariz. 250, 665 P.2d 972, 988 (1983) (review to "independently determine if the trial court correctly applied aggravating and mitigating circumstances"); State v. Beaty, 158 Ariz. 232, 762 P.2d 519, 529 (1988) (review "to determine whether the death penalty was improperly imposed or should be reduced to life"). See also State v. Rumsey, 136 Ariz. 175, 665 P.2d 48, 55 (1983) (independent review conducted "as an appellate court, not as a trial court"); State v. Smith, 131 Ariz. 29, 638 P.2d 696, 700 (1982) (on review, "the credibility of ... witnesses is for the trier of fact").

also id. at 103. Similar language has been used in other cases describing the review function. See, e.g., State v. Lambright, 138 Ariz. 63, 673 P.2d 1, 14 (1983); State v. Richmond, 136 Ariz. 312, 666 P.2d 57, 66 (1983). Since the Arizona statutes make no special provision for appellate review of the sentence imposed in a capital case, it would be surprising if the Arizona court took any different approach.

Respondent's attempt to dress up the Arizona sentencing process, in an effort to pass this Court's muster, cannot change what the Arizona courts have repeatedly said and done in sentencing, in this case and others. Neither can its treatment of the sentencing process in this case. Resp. Br. 38.

The record contains no indication that the trial court's rejection of Petitioner's mitigating evidence of drug use and childhood physical and sexual abuse was

based on anything other than the statutory preponderance standard. The court's single conclusory statement that it had "considered all other mitigating factors set forth" (J.A. 56) is at best ambiguous and cannot have been meant in the broad sense in which Respondent would read it.[14] Similarly, the record nowhere suggests that the trial court "exercised its discretion and found the aggravating factors in Petitioner's case sufficiently substantial

[14]The court's statement that it had "considered ... all other mitigating circumstances as stated by your attorney on the record this date"--cannot mean that the court gave mitigating weight to all those circumstances. The sentencing order was plainly written before any "mitigating circumstances" were "stated" by Mr. Walton's attorney in open court. See note 9, above. Moreover, the trial court plainly and explicitly rejected one of the major arguments in mitigation--that Petitioner was not the person who shot Mr. Powell. See J.A. 48-9, 56. Since the court's summary statement that it had "considered" all the mitigating factors presented clearly included that fact, which it rejected, it is impossible to know how many other factors it heard evidence on but rejected under the preclusive statutory standard as well.

to warrant the imposition of death." Resp. Br. 38.[15] Arizona law gave the court no discretionary authority to determine if the aggravating circumstances were "sufficient," and nothing in its sentencing order intimates that it usurped that authority. To the contrary, what the sentencing order says is that the court found aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency"--and "[t]herefore" the sentence was death. J.A. 57.

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[15] The prior crime evidence that Respondent features (Resp. Br. 27), apparently in an effort to bias this Court, was neither admissible to establish an aggravating circumstance under Arizona law nor considered anywhere in the sentencing decision. If it matters, Petitioner's prior actually consisted of a single instance of robbery (which involved no weapon and no injuries to anyone) and a walkaway escape from a juvenile detention facility. See Presentence Report at 2 and App. 14. Petitioner's indictment for an alleged jailhouse assault never went to trial. That is why these events were not urged as aggravating factors under A.R.S. 13-703(F)(2).

Respondent's attempts to portray it otherwise cannot change the fact that the Arizona statute lies at the extreme end of the post-Lockett continuum, in its restriction of sentencing discretion and its bias in favor of the imposition of death. Some or all of the features that place it there may well be individually unconstitutional, as the Petitioners in the Blystone and Boyde cases now before the Court have argued. But even if no one of these features alone offends the Constitution, in combination they cannot be squared with the Eighth Amendment.

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE ARIZONA COURTS HAVE CURED THE FACIAL UNCONSTITUTIONALITY OF THE STATUTORY "HEINOUS, CRUEL, OR DEPRAVED" AGGRAVATING CIRCUMSTANCE.

The most striking thing about Respondent's argument on the constitutionality of Arizona's "heinous, cruel, or depraved" aggravating circumstance is its illustration of the fact that

the Arizona Supreme Court--like its Oklahoma counterpart in Maynard v. Cartwright, 108 S.Ct. 1853 (1988)--has never developed any single touchstone by which to determine its presence or absence. Appellant's lengthy footnotes and detailed appendix only underscore the seemingly limitless variety of facts that the Arizona Supreme Court has found sufficient to qualify a defendant for death under this provision.

Respondent's arguments on this point also well illustrate how the definition of the provision has evolved, and continues to. For example, the generic definition of the statutory terms that Respondent quotes from State v. Knapp, 114 Ariz. 531, 562 P.2d 704, 716 (1987) (see Resp. Br. 41),[16]

[16]It warrants mention that the language of this Knapp "definition" closely parallels the one included in the trial court's instruction to the jury in William Cartwright's trial. See Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc).

later changed so that the focus was no longer on the defendant's "dispos[ition] to inflict pain," State v. Knapp, supra, 562 P.2d at 716, but upon the "pain and distress visited upon the victims" itself. State v. Gretzler, supra, 659 P.2d at 10. See Pet. Opening Brief at 45 n.33. From there it expanded in two directions: to include suffering that was purely psychological, as well as the experience of physical pain; and to include such suffering where it was "reasonably foreseeable," even if specifically unintended, see State v. Adamson, supra. Both of these expansions reached their current limit in this case, where the Arizona Supreme Court appears to have held that the fear and anguish suffered by the victim of a robbery, alone, is sufficient, even where the robbers made no apparent effort to enhance the fear that inevitably accompanies such a crime and even tried to

quell it by reassuring the victim he would not be harmed. See J.A. 24.

Statutes which expand from one case to the next cannot tell sentencing authorities "what they must find to impose the death penalty." Maynard v. Cartwright, supra, 108 S.Ct. at 1858. The willingness of Arizona judges to continually add to the set of examples of conduct which qualifies for death under the law "leaves them and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 ... (1972)." Ibid. It also magnifies the opportunity for error in the determination of whether some fact in a case can be analogized to something found in another, to make it qualify for inclusion through this process, as the present case vividly illustrates.

It is for this reason that, contrary to Respondent's assertion, the accuracy of the lower court's assessment of the record is very much a part of the question presented here.[17] This case is part of the body of state decisional law which Respondent claims has saved the Arizona statute from unconstitutionality under

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[17]Respondent would have the Court ignore the crucial factual errors underlying the Arizona Supreme Court's finding of "cruelty," arguing that those errors lie outside the scope of the question presented in this case. Resp. Br. 41n.14. That would be a cramped interpretation of the scope of the grant of certiorari here, indeed. The certiorari petition in this case argued, in support of its claim that the statute had been unconstitutionally "interpreted and applied by the Arizona courts," that the Arizona Supreme Court "appears to rely on whatever events are presented to it," "review[s] the record for any actions or events that it believes to be especially heinous, cruel or depraved," and applies the statute "in an arbitrary and capricious manner ...." Petition at 14-15, quoting Adamson v. Ricketts, 865 F.2d at 1036-38. Surely that submission fairly includes the point that the Arizona Court has gone so far as to rely in part on supposed facts "presented to it" in argument, without any substantial basis in the record.

Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976). It appears to mark the extreme end of the expansion of both the "cruel" and the "depraved" prongs of the statute[18]--for the present, at least. The Arizona courts found cruelness and depravity by stretching both the definition of these statutory terms and the inferences to be drawn from the record of this case, to the point where no principled restriction on its power to stretch the law and the facts can be identified. That is of central relevance to the issue here.

It is also for this reason that Respondent's looseness with the record facts is significant. In terms almost identical to the arguments that misled the

[18]The evolution and varying applications of the other parts of Arizona's F(6) aggravating factor applied here have been thoroughly traced in the Brief of Respondent in Lewis v. Jeffers, No. 89-189.

Arizona Supreme Court,[19] Respondent tells this Court that, on the way to the scene of the shooting, "Powell pled with his abductors to spare him." Resp. Br. 48. A look at the part of the record which Respondent cites for that assertion belies it. See J.A. 22-3.

Not content with that--because it lends no support to the Arizona Supreme Court's even more dramatic statement that later, just before he was shot, Mr. Powell "begged the defendant not to kill him" (J.A. 98)--Respondent takes the liberty of adding words to the transcripts of record,

[19]See Appellee's Brief at 48, State v. Walton, Arizona Supreme Court No. CR 87-0022-AP. This argument by the State appears to be the original source of the Arizona Supreme Court's confusion; Appellant's appellate public defender had no occasion to address that fact in his Opening Brief, as Respondent argues he should have, because the assertion had not been made at that time. Presumably he did not correct the assertion in his state Reply Brief because it was incidental to the State's argument, which focused completely on the post-shooting suffering experienced by Mr. Powell. Id. at 49-52.

and even italicizes those words for emphasis. Resp. Br. 49. According to the record,[20] the statement involved--related by Petitioner to police after his arrest--was actually made by Mr. Powell to Robert Hoover; the trial record reports it thus: "the guy told Rob, he goes, don't hurt me, I don't tell anybody, ((inaudible))." Tr. 12/15p at 82. The words Respondent adds to replace the ((inaudible)) are "take the car and leave." Resp. Br. 48. Apparently the inference Respondent seeks to have the Court draw from this added phrase--which appeared nowhere in the record before the Arizona Supreme Court--is that Mr. Powell made the statement at the scene of the shooting, not in the car on the way there (where Sharold Ramsey testified something similar was said, see Pet. Brief 6), and to

[20]For the Court's convenience, we have set forth the portion of the official transcript of the relevant part of Petitioner's taped statement, as Appendix B to this Brief.

Petitioner rather than Hoover or someone else. The record simply won't support that, even at the level of inference--much less to the certainty beyond a reasonable doubt Arizona law supposedly requires.

Respondent thus cannot escape the fact that the actual evidence before the Arizona Supreme Court indicated nothing more in this regard than that Mr. Powell felt the kind of fear which any robbery victim would have, and sensibly told his robbers "he would give us a ride somewhere and he wouldn't tell nobody." J.A. 22. Evidence of that kind of fear cannot provide a "principled means ... to distinguish those [persons convicted of murder] that received the death penalty from those that did not." Maynard v. Cartwright, supra, 108 S.Ct. at 1858.[21]

[21]Respondent disregards the other Arizona cases we have identified, where no "cruelty" finding was made on similar facts, because they "differ procedurally from petitioner's." Resp. Br. 44.

Of course, the fear experienced by any robbery victim can be translated into

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Procedural differences are a pale excuse for such clear inconsistencies in the application of a death penalty statute. Nor are they an adequate explanation under Arizona law, which does not deprive trial courts of the "authority to find aggravation not requested by the state," ibid., as Respondent asserts. State v. Murphy, 113 Ariz. 416, 555 P.2d 1110, 1112 (1976), held only that trial judges could not "direct[] the prosecutor to put on evidence of aggravating circumstances." (emphasis added). No evidence beyond that of the crime itself is required to determine if a homicide was "especially cruel;" that is why the cases we cited report those facts, even though the finding was not sought in some of them.

It is therefore wholly irrelevant that "the opinions do not indicate whether the state sought the cruelty factor." Resp. Br. 44. Moreover, had Respondent chosen to look even at the cases from Maricopa County (Phoenix) alone, it would have found that, in many cases, that factor was "sought" and rejected in a special verdict explicitly holding the crime was not "especially cruel." See, e.g., State v. Carr, No. Cr. 141693; State v. Vaughn, No. Cr. 134298; State v. Cookus, No. Cr. 86534; State v. Hensley, No. Cr. 117651; State v. Nash, No. Cr. 130037. Those courts concluded that the victims' fear alone would not support this finding, presumably because they recognized that nearly all homicide victims experience fear. But under this vague statute, they could only guess at what the statute could be interpreted to mean.

"mental anguish" and then "cruelty" through a rhetoric driven by understandable anger at a tragic and senseless crime. But it was largely to tether this kind of natural outrage that Maynard and Godfrey required aggravating circumstances to be clearly defined and regularly applied. To keep the promise of Gregg that statutory aggravating circumstances will control capital sentencing discretion by "'clear and objective standards so as to produce non-discriminatory application,'" 428 U.S. at 198, the statutory circumstances must be construed and applied in a "principled way [that suffices] to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, supra, 446 U.S. at 433. If that sort of principled distinction can ever be said to have been provided by Arizona's "heinous, cruel, or depraved" circumstance, it was plainly abandoned in

this case.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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January 9, 1990.

APPENDIX A

§921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of

the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific

written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

APPENDIX B

Transcript Excerpt From Petitioner's Taped Statement to the Police

Trial Transcript 12/15p 82-83

Q Do you remember if Robert got in a fight or scuffle with this man?
A He could have, I don't remember. All that I remember is the guy was, the guy told Rob, he goes, don't hurt me. I don't tell anybody, ((inaudible)).
Q Did Rob have his gun out when he said that?
A I don't think so.
Q You didn't see it? Was Rob planning on taking the man's car?
A ((No answer.)).
Q When did he plan on doing that?
A What do you mean, did he plan on taking it?
Q Well, did he decide that he was going to take the man's car, is that why there was an argument and a scuffle?
A I don't know. I don't, I don't remember there being an argument or a scuffle.
Q You remember the man saying, don't hurt me, take my car, I won't tell anybody?
A Yeah.
Q How did that come up?
A ((Inaudible)).

FOR ARGUMENT

(8)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-7351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,
Petitioner

v.

ARIZONA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI LISTED ON THE INSIDE COVER* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Most of the amici curiae are states which have death penalty statutes enacted in response to this Court's decisions in Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).[2] The Court in Furman sought to limit the overbroad discretionary power of the capital sentencer to impose the death penalty. Pursuant to these decisions, amici enacted statutes which narrowed the class of death-penalty eligible offenders and which provided that the sentencers should consider mitigating evidence

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[2]Although the legislature in amicus curiae Kansas has not, as yet, enacted a death penalty statute, Kansas recognizes the importance of this issue and joins this brief.

as part of their individualized consideration of the defendants' crime and circumstances. After Furman, the statutory list of mitigating factors came into prominence and the Court in Gregg and Proffitt upheld the validity of guided jury discretion statutes patterned after the Model Penal Code.[3] The Model Penal Code is silent as to the burden of producing evidence of mitigation and the burden of proof on the issue.

Since Furman, many states, including amicus Pennsylvania and respondent

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[3]"[O]f the thirty-seven states which presently provide for capital punishment, only Texas and Oregon depart substantially from the Model Penal Code capital-sentencing format." Sicola, Shreves, Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute, 15:55 Am.J.Crim. Law 65 (1988).

Arizona, have placed minimal burdens of proof on defendants to prove mitigation in capital sentencing hearings.[4] If the Court reverses State v. Walton, 769

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[4]Various states by statute or case law explicitly place upon a defendant a burden to prove evidence in mitigation by a preponderance of the evidence. E.g., Arizona, Ariz. Rev. Stat. § 13-703(c)(defendant has burden of producing mitigating evidence) State v. Leslie, 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985); State v. Harding, 137 Ariz. 278, 292, 670 P.2d 383, 397 (1983), cert. denied, 465 U.S. 1013 (1984); State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, cert. denied, 454 U.S. 882 (1981), State v. Rossi, 741 P.2d 1223 (Ariz. 1987)(defendant must prove by a preponderance of affirmative evidence the existence of what he asserts); Connecticut, State v. Daniels, 207 Conn. 374, 542 A.2d 306 (1988), Conn. Gen. Stat. § 53a-46(a) (West 1977); Florida, Fla. Std. Jury Instr. (Crim) § F.S. 921.141(6) (1985) (defendant establishes a mitigating circumstance if the jurors are "reasonably convinced [it] exists"); Kentucky, Ky. Rev. Stat. Ann § 523.025(b) (Michie/Bobbs - Merrill 1986), Smith v. Commonwealth, 599 S.W.2d 900, 911 (Ky. 1980); Maryland, Art. 27 § 413(g)(Supp. 1987), Foster v. State, 304 Md. 439, 476, 499 A.2d 1236, 1255 (footnote continued on next page)

P.2d 1017 (Ariz. 1989) and declares invalid Arizona's resolution of this

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[4](continued) (1985), reconsideration denied, 305 Md. 306, 503 A.2d 1326, cert. denied, 478 U.S. 1010 (1986) (risk of nonproduction and nonpersuasion is on the defendant); North Carolina, State v. McKoy, 323 N.C. 1, 372 S.E. 2d 12 (1988), cert. granted sub nom. McKoy v. North Carolina, ___ U.S. ___, 109 S.Ct. 1117 (1989), State v. Johnson, 298 N.C. 47, 75 n. 28, 257 S.E.2d 597, 618 n. 28 (1979); Ohio, Ohio Rev. Code Ann. § 2929.03(D)(1)(Anderson 1987) and State v. Jenkins, 15 Ohio State 3d 164, 171-172, 473 N.E.2d 264 (1984), compare State v. Lawrence, 44 Ohio State 3d 24, 541 N.E.2d 451, 455 (1989). Pennsylvania, 42 Pa. Cons. Stat. Ann. § 9711(c)(1) (iii) (Purdon 1982) ("mitigating circumstances must be proved by the defendant by a preponderance of the evidence"); Wyoming, Wyo. Stat. § 6-2-102(d)(i)(B) (Supp. 1989) (jury determines "[w]hether, by a preponderance of the evidence, mitigating circumstances exist...".)

Other states require the defendant to produce evidence of mitigation or to otherwise inject the issue into the proceedings, but do not place a burden of persuasion on the defendant. See e.g., Ala. Code § 13A-5-45(g) (state must disprove mitigating circumstance by preponderance; defendant has the burden of "interjecting the issue"); Ill. Stat. (footnote continued on next page)

issue, existing death sentences in these states and federal death sentences

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[4](continued) Ann. ch 38, 9-1 g (Smith-Hurd 1987) and, People v. Holman, No. 63771, slip. op. (Ill. Supreme Court, October 25, 1989), ___ Ill.2d ____, ___ N.E.2d ____, 1989 Ill. Lex. 135 (1989) (defendant must produce evidence but there is no required burden of proof on either party); Cf. Gaines v. Thieret, 665 F.Supp. 1342 (1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (no burden of production, state has burden of persuasion); N.J. Stat. Ann. § 2C:11-3(c) (2) (West Supp. 1987) (defendant has burden of producing evidence, no burden of proof on either party).

A number of states continue to have language which, like the Model Penal Code, does not define who has the burden of proof as to mitigation; moreover, the state decisional law also does not establish a burden of proof. See e.g. Cal. Penal Code § 190.3 (West Supp. 1988) and People v. Johnson, 47 Cal.3d 1194, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989) (confirming that there is no established burden of proof); Colo. Rev. Stat. § 16-11-103(1)(d) (1987) ("There shall be no burden of proof as to proving or disproving mitigating factors."); La. Rev. Stat. Ann. § 905.5 (West Supp. 1988) and State v. Sonnier, 402 So.2d 650 (La. 1981) ("capital sentencing procedure does not establish any presumptions or burdens of proof with (footnote continued on next page)

could be invalidated. See 21 U.S.C.A. § 848 (j) (West Supp. 1989). Moreover, this Court's intervention in criminal procedures currently governed by state law could cause widespread attacks on all nature of burden of proof has tradi-

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[4](continued) respect to mitigating circumstances." Id. at 657); Mo. Ann. Stat. §§ 565.030, 565.032 (1986); Mont. Code Ann. Section 46-18-305 (1987); N.H. Rev. Stat. Ann. § 630.5 (1987); N.M. Stat. Ann. 31-20A-2 (1978) (statute and case law are silent on burden of production and persuasion); Okla. Stat. Ann. title 21, §§ 701.10, 701.11 (West Supp. 1987); Or. Rev. Stat. § 165-150 (1989); and S.D. Codified Laws Ann. § 23A-27A-3 (Michie 1988).

A fourth approach places the burden of proof on the state. See e.g. Wash. Rev. Code § 10.95.060(4) and State v. Mak, 105 Wash. 2d 692, 718 P.2d 407, 444 (1986), (construing statutory requirement that jury be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstanes to merit criminal statutes where the leniency" to place the burden of proof on the state).

tionally been placed on defendants to show circumstances of justification, excuse, or alleviation.

SUMMARY OF ARGUMENT

1. Arizona's imposition of a minimal burden of proof of mitigation on the defendant in the sentencing phase of a capital case is consistent with this Court's decisions allowing states to require that defendants carry the burden of proof with regard to affirmative defenses presented during the guilt phase of a criminal trial. This Court, in an unbroken line of authority, has consistently upheld state decisions on the burden of proving affirmative defenses. See Leland v. Oregon, 343 U.S. 790-799 (1952); Patterson v. New York, 432 U.S. 197 (1977); and Martin v. Ohio, 480 U.S. 228 (1987).

Arizona's assignment of the burden of proof of mitigation comports with traditional treatment on the issue; is consistent with our notions of fundamental justice as set forth in these

cases; and is thus, consistent with this Court's jurisprudence on the issue at the guilt phase.

2. Even greater latitude is given to states under this Court's Due Process Clause analysis when the issue arises during the sentencing phase. While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), the process due at sentencing is not the full panoply of constitutional safeguards required at trial. Ibid. at 358 n. 9.

The issue of mitigation only comes into play at sentencing, after the state has proven beyond a reasonable doubt each element of the capital crime. At this point, traditionally, "sentencing courts have always operated without constitutionally imposed burdens of proof." McMillan v. Pennsylvania, 477

U.S. 79, 92 n. 8 (1986). Amici submit that filling that void, either statutorily or by state court decisional law, in the manner at issue comports fully with a defendant's right to due process.

3. Placing some minimal burden of proof of mitigation on the defendant does not hinder sentencer consideration of relevant mitigating circumstances.

The special requirements of due process and the Eighth Amendment in the context of a capital sentencing procedure are furthered, not hindered, by the procedure chosen by respondent. Placing the burden of proving mitigation on the defendant by a preponderance of the evidence permits individualized sentencing based upon reliable fact-finding. Arizona's mechanism for channeling sentencer discretion is neither mandated

by nor prohibited by Lockett v. Ohio, 438 U.S. 586, (1978) and Eddings v. Oklahoma, 455 U.S. 586 (1978).

As this Court has made clear several times, "we are unwilling to say that there is any one right way for a State to set up its capital punishment scheme." Spaziano v. Florida, 468 U.S. 447, 464 (1984); Cabana v. Bullock, 474 U.S. 376 (1986); Baldwin v. Alabama, 472 U.S. 372 (1985); Pulley v. Harris, 465 U.S. 37, 45, (1984).

The decision in Lockett left unanswered the issue of the propriety of the state's placing a burden of proof as to mitigating factors on the defendant. The amici submit that Arizona's resolution of this issue is one of the right ways a state may set up its capital punishment scheme.

ARGUMENT

A STATE MAY CONSTITUTIONALLY CHANNEL JURY DISCRETION IN CAPITAL SENTENCING BY REQUIRING THE DEFENDANT TO BEAR THE BURDEN OF PROVING A FACTOR IN MITIGATION BY A PREPONDERANCE OF THE EVIDENCE

A. Burdens of Proof May Be Placed On Defendant To Prove The Existence Of Mitigating Factors At The Guilt Stage

Historically, defendants have borne the burden of proving mitigation. Indeed, at common law, proof of "all... circumstances of justification, excuse, or alleviation" rested on the defendant. IV W. Blackstone's Commentaries 201 (Lippincott 1877). "This was the American rule when the Fifth Amendment [and the Eighth Amendment were]... ratified. Commonwealth v. York, 50 Mass. 93 (1845)." Patterson v. New York, 432 U.S. 197, 202 (1977) (footnote omitted). See also Fletcher, Two Kinds

of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 882-884 (1968) and Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1304 n. 21 (1977).

Upholding the validity of a statute which placed the burden of proving (beyond a reasonable doubt) an insanity defense on the defendant in a capital case, this Court stated: "We are reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." Leland v. Oregon, 343 U.S. 790, 799 (1952). Stating that the rule in Leland remained good law in the aftermath of In re Winship, 397 U.S. 358 (1970) and

Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court went on to establish a framework for resolution of the burden of proof issue which when applied to this case compels affirmance. See Patterson v. New York, 432 U.S. 197 (1977) (upholding New York law requiring that defendant in a prosecution for second degree murder prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter.)

According to Patterson, to afford due process, the State need not disprove or prove beyond a reasonable doubt "every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the sentence." Id. at 207. Winship and Mullaney mandate the burden of proof for

elements of the crime, not for defenses.

Noting that:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. . . . [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 201-202, quoting Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland, supra at 798, and Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), the Court concluded that the State could put the burden of proof on defendant:

> If the State nevertheless chooses to recognize a factor

> that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the state to prove its nonexistence in each case in which the fact is put in issue, if in its judgment, this would be too cumbersome, too expensive, and to inaccurate.

432 U.S. at 209 (emphasis added) . Accord Martin v. Ohio, 480 U.S. 228 (1987) (upholding Ohio statute which placed on defendant the burden of proof by a preponderance of evidence for the affirmative defense of self-defense.)

Arizona's assignment of the burden of proof of mitigation comports with traditional treatment on the issue; is consistent with our notions of fundamental justice; and is thus, consistent with this Court's jurisprudence on the issue at the guilt phase.

B. Even Greater Latitude Is Given To States Under This Court's Due Process Clause Analysis Of Burden Of Proof Issues At Sentencing

While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), it has often concluded that the process required at the sentencing stage is not mandated by the process required at trial. Ibid. at 358 n 9.

"Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. See Williams v. New York, 337 U.S. 241 (1949)." McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986). Moreover, this Court has "never attempted to define precisely the constitutional limits. . . to which due process forbids the reallocation or reduction of burdens

of proof in criminal cases. . ." Id. at 86.

Sentencing under federal guidelines must be based upon "information [that] has sufficient indicia of reliability to support its probable accuracy." Guideline § 6A.13(a). The Sentencing Guidelines do not specifically address the subject of standards of proof or which party should bear the burden. Federal courts, however, "have generally agreed that a preponderance standard is the proper measure." United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir. 1989) cert. denied, sub nom. Urrego-Linares v. United States, ___ U.S. ____, 110 S.Ct. 346 (1989) (citations omitted). In Urrego Linares, the Court held that:

> [I]f the government seeks to enhance the sentencing range and potentially increase the ultimate sentence, it should

bear the burden of proof.

* * *

> [However] if the defendant advances a mitigating factor which, if accepted by the court, would lower the sentencing range and potentially reduce the ultimate sentence, the defendant should bear the burden of proof to establish the mitigating factor(s) by a preponderance.

Id. at 1239 (citation omitted).

This is precisely the manner chosen by respondent and a number of amici to channel sentencer discretion. See n. 4, supra. Significantly, the United States Congress codifies the burden of proof in capital sentencing in the same manner. 21 U.S.C.A. § 848(j) (West Supp 1989). ("The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on

the defendant, and is not satisfied unless established by a preponderance of the evidence.")

The procedure challenged by Walton has widespread acceptance as expressed by state and federal statutory and decisional law.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth consideration in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Leland v. Oregon, 343 U.S. 790, 798 (1952).

The "process due" at sentencing has never been held to require that the State bear the burden of proof on each and every factual question, the resolu-

tion of which may lead the sentencer to imposition of a penalty required by the legislature. McMillan, supra. There is nothing about a capital sentencing hearing that should cause this Court to construe Lockett or Mills, infra, as mandating an exception to the generally accepted principle espoused in Patterson, Martin, and Leland concerning the state's prerogative to assign a burden of proof to a defendant.

C. A State May Channel Jury Discretion By Requiring That The Defendant Prove Mitigating Factors And Still Comply With Eighth Amendment Individualized Sentencing

Amici recognize the special requirements imposed upon states to assure constitutional application of the death penalty by allowing a moral reasoned response informed by relevant evidence of mitigating circumstances. In this Court's decisions, the Court has recognized the propriety of allowing a defendant to bring forward the evidence in mitigation. See, e.g., Jurek v. Texas, 428 U.S. 262, 276 (1976) (authorizing the defense to bring before the jury whatever mitigating circumstances can be adduced); Lockett v. Ohio, 437 U.S. 586, 604 (1978) (sentencing authority may not be precluded from considering any aspect of record or character of defendant that

the defendant proffers as a basis for lesser sentence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (Eighth Amendment requires that capital sentencing schemes permit the defendant to present any relevant mitigating evidence); Skipper v. South Carolina, 476 U.S. 1 (1986) (remanded for new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence).

Individual justices of the Court have stated, either explicitly or implicitly, that evidentiary burdens to prove mitigation may be placed on the defendant. "There can be no infirmity in shifting the burden of persuasion to the defendant." Lockett v. Ohio, 438 U.S. 586, 633 (Rehnquist, J., concurring in part and dissenting in part); "'Evidence in mitigation' must rise to a certain level of persuasiveness before

it can be said to constitute a 'mitigating circumstance.'" Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (Burger, C.J., dissenting).

Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988) is not to the contrary. The burden of proof issue was not presented to or decided by this Court in Mills. Mills addressed sentencing instructions which precluded jury consideration of mitigating evidence which Maryland conceded was "legally relevant." 108 S.Ct. at 1865, n.7. Here, the Arizona trial judge considered all potentially mitigating evidence proffered by the defendant. (Pet. Brief p. 14) However, only evidence of mitigating facts more likely true than not is sufficiently certain under Arizona's scheme to form the basis of a sentencer's rejection of the death penalty. Such state channeling of

sentencer discretion should be validated.

There is nothing about the nature of mitigating evidence or finding mitigating factors which precludes placing an affirmative burden as to their existence on a defendant. As stated in Proffitt v. Florida, 428 U.S. 242, 257 (1976);

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a law suit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the. . . mitigating circumstances.

428 U.S. at 257-258.

In states such as Pennsylvania where capital sentencing is placed in the hands of jurors, the guidance provided by a minimal burden of proof encourages uniformity in jury behavior.

This Court has often said that sentencing should be individualized. See, e.g. Sumner v. Shuman, 483 U.S. 66, 75 (1987). The "individual" referred to is the defendant, not the juror. "Punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, 2947 (1989). Uniformity in the standard of evaluation of proffered circumstances of mitigation assures that a criminal defendant will have the evidence he proffers in mitigation measured by the same standard no matter what the individual predilections of the sentencer may be.

The contrary view, urged by Walton, was adopted in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), cert. pending. There, the Court of Appeals struck down the Arizona death penalty

statute holding, inter alia, that the state could not place any kind of burden of persuasion on the defendant. Id. at 1043. The Court of Appeals effectively demands that there be no evidentiary standards to guide the sentencing authority in its consideration of mitigating circumstances. If this Court is prepared to accept Walton's argument that standardless consideration of all conceivable assertions proffered in mitigation is a constitutional requirement, then it will have travelled full circle since Furman v. Georgia, 408 U.S. 238 (1972), holding that the very aspect of capital punishment that once made it unconstitutional--totally unguided sentencer discretion--now is necessary to comply with the Eighth Amendment.

That this untrammelled discretion would occur only as to mitigating

evidence does not diminish the seriousness of this standardlessness. Society, as well as the defendant, has a stake in the outcome of the sentencing hearing. Gardner v. Florida, 430 U.S. 349, 358 (1977). While occasional grants of mercy are not unconstitutional, Gregg v. Georgia, 428 U.S. 153, 199 (1976), it is important that sentences of life, like sentences of death, appear based on reason, not merely sympathy or prejudice--factors which should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." California v. Brown, 479 U.S. 538, 542 (1987). The consequences of such standardlessness extend beyond the "cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far

graver risk in executing others." Skipper v. South Carolina, 476 U.S. at 1, 14 n.2 (1986) (Powell, J., concurring).

A plurality of this Court, recognizing the dangerousness of such unfocused consideration of mitigating evidence, recently stated:

> Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors....Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin v. Lynaugh, 487 U.S. 164, ___, 108 S.Ct. 2320, 2330 (1988).

It is superficially appealing to extend Lockett's and Eddings' requirement of consideration of relevant miti-

gating evidence into an analysis of burdens of proof; however, full consideration of evidence proffered to prove mitigation and the evidentiary burdens of proof necessary to prove the existence of mitigating factors are two entirely different issues. See Adamson v. Ricketts, 865 F.2d 1011, 1065 (9th Cir. 1988) (dissent).

The burden of proof issue is at the confluence of the two lines of authority which form the basis of Eighth Amendment jurisprudence. The Eighth Amendment requires "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," Woodson v. North Carolina, 428 U.S. 280, 303 (1976), and that "a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's

character or background, and the circumstances of the offense." California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor J., concurring). These requirements "are somewhat in 'tension' with each other." Franklin v. Lynaugh, 487 U.S. 164, ___, 108 S.Ct. 2320, 2331 (1988). The balance struck by the Arizona legislature and defined by the Arizona Supreme Court is a constitutional accommodation of the competing interests. Amici urge that the Court uphold the validity of the Arizona statute, as one permissible manner a state may provide for a death penalty.

CONCLUSION

Amici curiae request this Court to affirm the judgment of the Supreme Court of Arizona.

Respectfully submitted,

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In The

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JEFFREY ALAN WALTON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State Of Arizona

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND NATIONAL JURY PROJECT IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully request leave to file the attached brief of *amici curiae* in support of petitioner. Although petitioner has consented to the filing of this brief, respondent has refused to consent to the filing.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with over 275,000 members. The ACLU was established to defend our Bill of Rights and has been continuously active toward that end. The ACLU is dedicated to advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Arizona is a local affiliate of the ACLU.

The National Jury Project is a corporation which engages in extensive research into a variety of areas and issues relating to the American jury system. One of the purposes of the National Jury Project, as reflected in its bylaws, is to conduct studies of the jury system for parties and legal counsel in civil and criminal cases, including cases involving the defense of human and civil rights as protected by law.

The brief proposed for submission by *amici* addresses the issue whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by Arizona law. This Court has not previously considered, under the Sixth Amendment, the validity of a state statutory scheme which absolutely denies a homicide defendant the right to have a jury make the factual findings necessary under state law to authorize imposition of the death penalty. This important question of first impression deserves the fullest examination and explication possible.

While the historical development of concepts embodied in the Bill of Rights is often a consideration in the

cases which come to this Court for review, such concerns play a particularly important role in cases implicating the Sixth Amendment. As this Court's opinions show, the decision of Sixth Amendment issues regularly turns on the understanding of the jury trial right held by the framers of our Constitution. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145 (1968). The decision in this case, likewise ought to be informed by as full and complete an understanding of historical foundations for the jury trial right as possible.

Amici, with long traditions of constitutional interpretation, are best suited to provide this Court with the historical context necessary to resolve the Sixth Amendment issue in this case.

The brief which *amici* propose to submit traces the jury trial right from its inception in medieval England through its installation as one of the cornerstones of our Bill of Rights. The brief examines the evolution of the law of homicide, and demonstrates the important role played by the jury in murder cases throughout the centuries. Based on this historical analysis, *amici* submit a test for use in determining when and under what conditions factual determinations which make eligible a homicide defendant for capital sentencing amount to elements of the crime of capital murder, for which the Sixth Amendment demands jury decision. Applying this test, *amici* argue that petitioner's death sentence, imposed by a judge without any jury participation whatsoever, violates the Sixth Amendment.

The briefs on the merits filed by the parties to this proceeding may address certain aspects of the historical underpinnings of our jury trial right. Nevertheless, given the number of issues presented by this case and the page limitations imposed by this Court, it is unlikely that either party will be able to fully treat the historical analysis *amici* believe this matter requires. Pursuant to Rule 36.3 of this Court's rules, *amici* therefore request leave to file the attached brief of *amici curiae* American Civil Liberties Union, American Civil Liberties Union of Arizona and National Jury Project in support of petitioner.

Respectfully submitted

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 275,000 members dedicated to defending the Bill of Rights and advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Arizona is one of the ACLU's affiliates.

The National Jury Project is a corporation which engages in extensive research into a variety of areas and issues relating to the American jury system. One of the purposes of the National Jury Project, as reflected in its bylaws, is to conduct studies of the jury system for parties and legal counsel in civil and criminal cases, including cases involving the defense of human and civil rights as protected by law.

This case presents the question whether a capital defendant has the constitutional protection of a trial by jury on the essential elements of capital murder. *Amici* believe that persons accused of capital murder possess a fundamental constitutional right to be tried by a jury, and that the decisions of this Court support the recognition of this right in the instant case. Accordingly, we submit this brief in support of Petitioner, and we urge the Court to reverse the decision of the court below.

SUMMARY OF THE ARGUMENT

In this brief, *amici* address only one of the several questions presented for review in this case, specifically, whether Arizona's death penalty statute violates the Sixth

Amendment by denying a jury trial on the factual elements of capital murder specified by state law. *Amici* support the petitioner's position that this question must be answered in the affirmative.

This Court's decisions establish the significance to Sixth Amendment analysis of the historical concerns that led to the adoption of the jury trial right by the framers of the Constitution. Based on an historical review of the jury's traditional fact-finding role in homicide cases, *amici* propose a test for deciding when a capital defendant has a Sixth Amendment right to jury determination of facts which authorize the ultimate penal sanction – death.

Throughout the history of the English and American criminal justice systems, the jury has represented the conscience of the community. As the law evolved, the jury's role in the criminal justice system became more clearly defined. By the time our Bill of Rights was adopted, the jury's broad authority to determine the facts in homicide cases was well established. The framers' contemporary understanding of the jury's role informs the now familiar maxim that the Sixth Amendment right to jury trial necessarily includes the right to have a jury determination with respect to every element of the criminal charge.

This Court has twice held that a capital defendant does not have a constitutional right to jury sentencing. *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 109 S.Ct. 2055 (1989). This Court has also held that a criminal defendant is not always entitled to a jury determination as to the facts that lead to an enhanced sentence. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). None

of these cases, however, address the specific issue presented here: Whether a capital defendant has a Sixth Amendment right to jury decision of the facts constituting the aggravating circumstances of the crime, which make the defendant eligible for the sentence of death.

Clearly, the Constitution does not require jury input into every facet of the sentencing decision. It is equally clear, however, that states may not withdraw from jury determination elements of a crime by simply redefining such elements as sentencing considerations. In order to resolve the tension inherent between these two concepts, *amici* submit the following test: Facts which lead to an enhanced sentence must be viewed as elements of an offense for which a jury determination is required if two conditions are met. First, the facts relate to the circumstances of the crime rather than the character of the offender; second, proof of the facts makes possible a significantly enhanced sentence. When the aggravating factors which authorized petitioner's death sentence are considered under this test, it is clear that they constitute elements of the crime of capital murder under Arizona law, and that petitioner's Sixth Amendment rights have been violated.

ARGUMENT

Arizona's Death Penalty Statute Violated Petitioner's Sixth Amendment Right to Jury Trial

In *Duncan v. Louisiana*, 391 U.S. 145 (1968) this Court held that the Sixth Amendment right to jury trial is essential to our scheme of justice. *Duncan* concluded that

"[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 155. This Court has indicated that the scope of the constitutional right to jury trial must be determined by analyzing the historical concerns that led to that provision's adoption. *See, e.g., Williams v. Florida,* 399 U.S. 78, 86-87 (1970); *Duncan v. Louisiana,* 391 U.S. at 151-154. In *Williams,* for example, the Court stated that in determining whether a particular feature of jury trial (in that case the number of jurors) is constitutionally required "[t]he relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." 399 U.S. at 99. Thus, the purposes historically served by the jury should be of particular relevance in defining the scope of the jury's fact-finding authority.

This Court explained those purposes in *Duncan,* when it observed that the jury trial provisions "reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt and innocence." *Id.* at 156. In short, the jury's essential role is to prevent government oppression by serving as a buffer between the government and the individual.

Historically, the jury has fulfilled this role primarily by serving as the final arbiter on all questions of fact.[1] In 1765, Sir William Blackstone, an authority who had enormous influence on the framers of the Constitution and the Bill of Rights[2] referred to the English jury as "the grand palladium of English liberty." In delineating the jury's authority, he distinguished between questions of fact and questions of law, explaining that "the principles and axioms of law . . . should be deposited in the breasts of the judges. . . . But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice." 4 W. Blackstone, *Commentaries* *350. Twenty-two years later, E. Wynne, an English commentator, stated the point more emphatically: "All that I have said or have to say upon the subject of Juries, is agreeable to this established maxim: 'that Juries must answer to questions of Fact and Judges to questions of Law.' This is the fundamental maxim acknowledged by the Constitution." E. Wynne, 3

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[1] The historical analysis contained in this brief is elaborated at greater length in White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial,* 65 Notre Dame L. Rev. 1 (1989)

[2] For example, John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay and Patrick Henry all read and acknowledged the authority of Blackstone's *Commentaries. See* Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact,* 51 N.Y.U. L. Rev. 731, 743-45 (1976). *See also* B. Mitchell & L. Mitchell, *A Biography of the Constitution of the United States* 22 (1964).

Eunomies: Dialogues Concerning the Law and Constitution of England 217 (2d Ed. 1785). Later authorities echoed this view of the jury's role.[3]

A. The Historical Understanding of the Jury's Role in Criminal Cases

(1) The Jury's Fact-finding Role in Homicide Cases

The original basis for the jury's role as fact-finder was that the jurors were the only ones who knew the facts. As Professor Thomas Green has shown, "[t]he early English jury was self-informing and composed of persons supposed to have first-hand knowledge of the events and persons in question. The judge instructed the jury on the law, but was himself almost entirely dependent upon the

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[3] *See, e.g., United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (opinion by Story, J.) ("I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law."). *See generally* J. Proffatt, *A Treatise on Trial by Jury* 318-19 (1880).

Most recently, this Court reversed a conviction on Due Process grounds, holding that jury instructions creating conclusive presumptions wrongfully eliminated the prosecution's burden of proving all elements of the crime charged. *Carella v. California*, 109 S.Ct. ___, 105 L.Ed.2d 218 (1989). Quoting the language from *Duncan v. Louisiana* cited earlier in this brief, Justice Scalia noted that the constitutional inadequacy inherent in conclusive presumptions stems not only from interference with the concept of the presumption of innocence, but also that a conclusive presumption " 'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury. . . ." *Id.* at ___, 105 L.Ed 2d at 223 (Scalia, J., concurring). (quoting *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)).

Jury for his knowledge of the case." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 414, 421 (1976) (hereinafter Green I).

During the sixteenth and seventeenth centuries, the modern criminal trial evolved. By the end of this period, witnesses testified to evidence in a court presided over by a judge. After being charged by the judge, the jury returned its verdict based on the evidence presented. Because the jurors no longer had personal knowledge of the facts, the Crown's power to control or influence jury verdicts increased. Professor John Langbein's examination of seventeenth century criminal trials indicates that judges sometimes exercised this power by essentially directing a guilty verdict or refusing to accept the jury's not guilty verdict. *See* Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978) (hereinafter Langbein, *Criminal Trial*). Moreover, when the jury was recalcitrant, judges sometimes resorted to even sterner measures. On occasion, juries were threatened with fines or even imprisonment if they failed to return the verdict sought by the Crown. *See* 4 W. Blackstone, *Commentaries* *361. Thus, although the jury technically retained its authority to determine the facts, in practice judges had the means of restricting their fact-finding authority.

By the end of the seventeenth century, primarily due to a number of polically charged cases, tension between judges and juries heightened. While the heightened tension was particularly obvious in trials involving seditious libel or other political offenses, it was also evident in homicide cases. For example, when Chief Justice Kelyng was charged with improper judicial conduct in 1667, three of the matters charged against him related to his

coercion of juries in homicide cases. For example, in one case where "a master's helper had beaten a boy 'about the head with a broomstaff' for doing careless work, Kelyng would not accept a verdict of manslaughter and threatened the jury with a fine. This produced the result he wanted: murder was found and the defendant was hanged in spite of the recommendation of 'gentlemen' of the county that he be spared." T. Green, *Verdict According to Conscience* 214 (1985) (hereinafter Green II).

The charges against Kelyng led to a House of Commons resolution that a bill should be drafted to the effect that threatening jurors with fines and imprisonment as a result of their verdicts was illegal. Although the bill never passed, the Court in *Bushell's Case*, 6 Howell's State Trials 999 (1670) (No. 231), decided three years later, explicitly held that a judge could not fine or imprison the jurors because he disagreed with their verdict. Over the next hundred years, the holding in *Bushell's Case* was extended to provide the jury with authority to determine facts without judicial interference. *See* Langbein, *Criminal Trial, supra,* at 298.

Thus, by the time our Bill of Rights was adopted, the jury's authority to determine facts in homicide cases was well established. Although judges retained some discretion to spare offenders convicted of capital offenses, the jury's power to determine whether the defendant committed the capital offense was absolute. In making this determination, the jury had to decide both whether the defendant killed the victim and whether he had the mental state necessary to be convicted of the capital offense.

(2) The Jury's Role in Seditious Libel Cases

The seditious libel cases of the eighteenth century are of special significance because they involved a serious and prolonged debate concerning the allocation of fact-finding authority between judges and juries. Moreover, in view of the framers' special concern for laws that restricted freedom of speech, this debate undoubtedly played an important part in shaping the framers' view of the jury's role in fact-finding. *See generally* Nelson, *Seditious Libel in Colonial America,* 3 Am. J. Legal Hist. 160 (1959).

Seditious libel was originally a common law crime. Thus, its elements were not authoritatively set down but evolved over the course of time. In order to establish seditious libel in England during the eighteenth century, the prosecution had to prove at least that the writing in question was seditious and that the defendant's act of publishing it was malicious. The jury's role in fact-finding was extremely limited, however. It was required to return "a general verdict of 'guilty' if it found that the accused intentionally published the writing and that the writing bore the meaning alleged by the prosecution." Green II, *supra,* at 319. In the event of a guilty verdict, the judge would then resolve the ultimate question of guilt or innocence by determining "as matters of law two questions that had the appearance of questions of fact: whether the act was done with criminal intent, and whether the writing was seditious or defamatory." *Id.*

The jury's limited role in fact-finding was attacked primarily on the ground that as "judges of fact . . . the

jury must consider all the 'circumstances,' (e.g., truth, intent) involved." *Id.* at 323. Significantly, lawyers and scholars making this argument sometimes drew upon the jury's role in homicide cases as an appropriate analogy. Since juries determined facts relating to the defendant's state of mind in those cases, so the argument went, there was no reason why they should be precluded from doing so in libel cases. In the *Trial of John Peter Zenger*, 17 Howell's State Trials 675 (1735) (No. 490), for example Zenger's lawyer, Andrew Hamilton, argued that:

> [U]pon indictment for murder, the jury may, and almost instantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say whether our newspapers are a libel or no libel as another jury has to say whether killing of a man is murder or manslaughter.
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> J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 91 (S. Katz 2d ed. 1972).

In Zenger's case, the judge refused to allow the jury to decide whether the words were libelous. Nevertheless, Hamilton argued to the jurors that they should acquit because they were themselves "witnesses to the truth of the facts we have offered." V. Buranelli, *The Trial of Peter Zenger* 112 (1957). After hearing this argument, the jury needed only a few minutes to acquit.

By the time the Bill of Rights was adopted, specific results – such as those in Zenger's case – as well as powerful arguments by authorities such as Lord Camden and Lord Erskine established that the jury's fact-finding role in libel cases could not be restricted. *See* Green II,

supra, at 320-23. The right to jury trial incorporated in the Sixth Amendment thus reflects the framers' contemporary understanding of the jury's role. Accordingly, it is evident that the Sixth Amendment right to jury trial necessarily includes the right to have a jury determination with respect to every element of the criminal charge. Thus, the legislature may not restrict a criminal defendant's right to jury trial by reallocating fact-finding authority between the judge and jury.

B. The Prior Decisions of This Court

A discussion of three particular recent opinions of this Court will be useful in isolating the key question presented in this case. *Spaziano v. Florida*, 468 U.S. 447 (1984) held that a capital defendant does not have a constitutional right to jury determination as to sentence and *Hildwin v. Florida*, 109 S. Ct. 2055 (1989) merely applied *Spaziano*. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), held that in certain situations the defendant is not entitled to a jury determination as to facts that lead to an enhanced sentence. None of these cases dealt with the issue presented in this case; nor did any of them develop a test for determining when a defendant will have a constitutional right to a jury determination as to facts that lead to a capital sentence.

Spaziano involved the constitutionality of Florida's capital sentencing scheme which provides that, after hearing evidence and argument relating to aggravating and mitigating circumstances, the jury recommends a sentence; then, after considering the jury's sentence, the

judge imposes sentence.[4] In Spaziano's case after weighing the evidence presented at the penalty trial, the jury recommended a sentence of life imprisonment. The trial judge concluded, however, that "notwithstanding the recommendation of the jury, . . . sufficient aggravating circumstances existed to justify and authorize a death sentence; . . . [and] the mitigating circumstances were insufficient to outweigh such aggravating circumstances . . . " 468 U.S. at 452. Specifically, the judge determined that two aggravating circumstances – that the homicide was especially heinous and atrocious and that the defendant had been previously convicted of a felony – were present and that there were no mitigating circumstances "except, perhaps, the age [28] of the defendant." *Id.*

In deciding the issue in *Spaziano*, this Court did not focus on the particular aggravating circumstances identified by the trial judge, but instead considered the broad question whether "the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458.[5] After considering the general characteristics of

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[4] Although Florida law allows the judge to impose a sentence of death even where the jury recommends life, the judge must give great weight to the jury's recommendation. As this Court observed in *Proffitt v. Florida*, 428 U.S. 242 (1976), under the Florida procedure: " '[i]n order [for the court] to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id.* at 249 (quoting *Tedder v. State*, 322 So.2d 908, 910 (1975)).

[5] The brief filed on behalf of Spaziano argued that "a trial judge's override of a jury's factually based decision against the

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capital sentencing, the Court held that a capital defendant does not have a constitutional right to jury trial at the penalty phase of a capital trial. Its basis for this holding was that the judge, as well as a jury, is able to fulfill the constitutional obligation of "evaluat[ing] the unique circumstances of the individual defendant" so as to impose sentence. 468 U.S. at 459.

The Court's analysis in *Spaziano* focused on the difference between sentencing and adjudicating guilt. Citing *Williams v. New York*, 337 U.S. 241 (1949), it emphasized that "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." 468 U.S. at 459. Thus, *Spaziano*'s holding seemed to be based on the conclusion that the kind of determination that takes place at the penalty stage under Florida's capital sentencing scheme is fundamentally different from the type of determination that takes place at the guilt stage of a criminal trial. Although the Florida sentencing judge is not permitted to impose a death sentence without making certain factual determinations, the Court did not focus on this aspect of Florida's sentencing procedure. Instead, it treated the case as one in which the judge determined whether a death sentence would be imposed primarily on the basis of his assessment of the individual characteristics of the particular offender.

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death penalty must, in all cases, violate the Fifth, Sixth, Eighth and Fourteenth Amendments." Brief for Petitioner at 20. The parties did not raise the issue whether the defendant had the right to a jury trial as to the presence or absence of one or more of the statutorily defined aggravating circumstances.

In *Hildwin v. Florida*, 109 S. Ct. 2055 (1989) this Court appeared to read *Spaziano* broadly by stating that the "existence of an aggravating factor [under Florida's capital sentencing statute] is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' " 109 S. Ct. at 2057 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 86). *Hildwin*'s holding did not purport to go beyond *Spaziano*, however. In *Hildwin*, the jury recommended death. Under the Florida jury instructions, the jury could not have done so unless it found one or more statutory aggravating circumstances sufficient to call for the death penalty. Therefore, *Hildwin* could not present the issue of the constitutionality of a death sentence unsupported by a jury finding of the aggravating circumstance or circumstances that made the defendant death-eligible. And the Court's *per curiam* opinion itself recognized the narrowness of the issue presented. It held:

> "If the Sixth Amendment permits a judge to impose a sentence of death when a jury recommends life imprisonment, . . . it follows that it does not forbid the written findings that authorize imposition of a death sentence *when the jury unanimously recommends death.*" 109 S. Ct. at 2056 (emphasis added).

That language says explicitly that the *Hildwin* jury's death verdict makes his case follow *a fortiori* from *Spaziano*.

Unlike *Spaziano* and *Hildwin*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), involved a situation in which an enhanced sentence was triggered entirely by a specific finding of fact. In *McMillan* the defendant was convicted of robbery, a felony subject to a maximum sentence of

twenty years in prison. He was sentenced under Pennsylvania's mandatory minimum sentencing act, which provides that anyone convicted of a felony will be given a mandatory minimum of five years imprisonment if the judge finds by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense. The defendant claimed that "visible possession of a firearm" was an element of the offense, requiring both jury trial and proof beyond a reasonable doubt.

This Court held that the case was controlled by *Patterson v. New York*, 432 U.S. 197 (1977). The five-Justice majority focused first on the specific provisions of the Pennsylvania statute: "the Pennsylvania legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, . . . but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt." 477 U.S. at 86. Acknowledging that *Patterson* does impose some constitutional limit on the government's power to base an increased sentence on factors that could have been defined as elements of a criminal offense, the majority concluded that this limit was not transgressed in *McMillan*.

The majority based this conclusion primarily on two factors. First, it emphasized that in contrast to the situation in *Specht v. Patterson*, 386 U.S. 605 (1967)[6] or *Mullaney*

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[6] *Specht* held that Colorado's Sex Offender's Act, which allowed a judge to sentence a convicted sex offender to an indeterminate sentence on the basis of a finding that the defendant was a threat to the public, an habitual offender, or mentally ill, violated due process.

v. Wilbur, 421 U.S. 684 (1975)[7], the stakes for the defendant were quite minimal: "[The Pennsylvania statute] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88. In addition, the Court observed that "the specter . . . of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case" because, in passing its Mandatory Minimum Sentencing Act, "[t]he Pennsylvania legislature did not change the definition of any existing offense." *Id.* at 89.

After stating that these differences between the present case and *Mullaney* and *Specht* were "controlling," the Court observed that its "inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *Id.* at 91.

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[7] *Mullaney* held that Maine's homicide statute, which required a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" to reduce a homicide charge from murder to manslaughter, violated due process.

The Court's analysis in these cases reaffirms the traditional, steadfast rule, reflected in *Mullaney*, *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *In re Winship*, 397 U.S. 358 (1970), that a criminal defendant has the right to a jury trial as to the facts that constitute elements of a criminal offense. Although *Spaziano* holds that a capital defendant has no right to a jury trial as to sentence, it does not determine the circumstances under which a defendant will have a right to jury trial as to facts that lead to an enhanced sentence.

McMillan, which deals with the latter question, holds that a defendant has no absolute right to a jury trial as to facts that trigger a minimum mandatory sentence, but *McMillan* takes pains to limit its holding to the particular facts in that case. Based on *McMillan*'s analysis, the scope of a defendant's constitutional right to jury trial as to facts that trigger an enhanced sentence appears to depend on various factors, including the magnitude of the sentence enhancement and the sentencing provision's legislative history.

However, neither *McMillan* nor any of this Court's other decisions purport to develop a test for determining when a defendant will have a right to jury determination as to facts that lead to an enhanced sentence.[8]

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[8] This Court has discussed some of the issuses implicated by judicial fact-finding in *Cabana v. Bullock*, 474 U.S. 376 (1986). *Cabana* reaffirmed the right to a jury trial on elements of the crime. *Id.* at 715. The issue in *Cabana*, however, was whether a defendant has a right to a jury determination of the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982). This Court concluded that because the Eighth Amendment principles in

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C. A Proposed Test for Determining a Capital Defendant's Right to Jury Fact-finding.

In constructing a constitutional role for the jury, the established boundaries – supported by history as well as current Supreme Court authority – are that the defendant has a right to jury trial as to facts that are elements of a criminal offense but not as to sentencing. Moreover, as *McMillan* implies, some limits must be placed on the legislature's authority to redefine elements of an offense as factors to be considered only at sentencing. Otherwise, by restructuring crimes so that facts that traditionally lead to enhanced criminal liability are changed to sentencing factors, the legislature could eliminate the defendant's right to a jury determination as to any facts beyond the minimum necessary to establish criminal liability. The crime of homicide, for example, could be redefined as unlawfully killing another, with traditional *mens rea* elements, such as malice or recklessness redefined as sentencing factors to be determined by the judge.

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Enmund do "not concern the guilt or innocence of the defendant" and "establishes no new elements of the crime of murder," there was no right to a jury trial on this issue. 474 U.S. at 715. Indeed, "*Enmund* 'does not affect the state's definition of any substantive offense, even a capital offense.' " *Id.* at 715-16 (quoting *Raddix v. Thigpen*, 728 F.2d 705, 709 (5th Cir. 1984). Thus, *Cabana* never addressed the issue presented here: whether the state may deny the right to a jury trial on elements that, under state law, determine whether a defendant is guilty of capital murder.

One principle that emerges from the seditious libel law controversy is that facts pertaining to the *actus reus* and *mens rea* of the offense must be treated as elements of the offense to be determined by the jury. In libel cases, for example, the defendant's right to a jury trial includes the right to a jury determination as to whether the defendant wrote the offending publication and whether he had the requisite criminal intent. In homicide cases, the defendant has the right to a jury determination as to whether he killed the victim and whether he had the requisite mental state to be found guilty of murder or manslaughter.

In the libel cases, of course, the factual elements to be determined are necessarily elements of the offense; in the absence of a finding that the defendant wrote the offending publication with the requisite criminal intent, the defendant would not be guilty of any crime. In homicide cases, however, the jury's determination as to the defendant's mental state is likely to affect the degree of the offense rather than the question of whether the defendant is guilty of any offense at all.

In situations where a factual determination leads to conviction of a greater offense (or enhanced sentencing) as opposed to the mere conviction of an offense, when should that determination be treated as an element of the offense as opposed to a factor to be considered at sentencing? Based on decisions of this Court, as well as the historical concerns that underlie the right to jury trial, *Amici* submit that the following test is appropriate: Facts that lead to an enhanced sentence must be viewed as elements of an offense for which a jury determination is required if two conditions are met. First, the facts relate to the circumstances of the crime rather than the character of the offender; second, proof of the facts makes possible a significantly enhanced sentence.

This approach is consistent with the framers' probable view of the jury's fact-finding role. In eighteenth century jury trials, the norm was for the jury to determine the facts relating to any circumstance of the offense that had a bearing on the defendant's criminal liability, including facts that would magnify the degree of the offense, and thereby increase the likelihood of a significantly enhanced sentence when measured by either the actual punishment imposed or the stigma that attached to conviction. In homicide cases, for example, the jury would decide whether the defendant was guilty of manslaughter or murder, two offenses that carried significantly different punishments and markedly different stigmas.

The focus upon whether the facts related to the circumstances of the offense rather than the character of the offender also corresponds with the jury's historical role. In the Middle Ages, jurors were selected because of their special knowledge of the crimes committed. Thus, these jurors' fact-finding authority naturally extended to all of the circumstances of the crime. By contrast, judges would decide whether the defendant was eligible for benefit of clergy, a determination largely dependent on an appraisal of the defendant's personal characteristics.

The test is also consistent with modern Supreme Court authority. In *Specht v. Patterson*, 386 U.S. 605 (1966), the Court held that a defendant is entitled to constitutional safeguards at sentencing when enhanced sentencing (in that case an increase of the maximum sentence from ten years to life imprisonment) is based on "a new finding of fact . . . that was not an ingredient of the

offense charged." *Id.* at 608. In *Specht*, the right to jury trial was not included within these constitutional safeguards because the Court had not yet held that the right to jury trial applies to the states through the Due Process Clause of the Fourteenth Amendment. *Specht*, together with *Duncan v. Louisiana*, 391 U.S. 145 (1968), seems to establish that the defendant has a right to jury trial at sentencing as to facts that are required to make the defendant eligible for the death penalty.

As explained earlier, this Court's decisions in *McMillan v. Pennsylvania, supra,* and *Spaziano v. Florida, supra,* are not to the contrary. In *McMillan,* the Court emphasized that the enhanced sentence resulting from the finding of fact in that case was relatively insignificant in comparison to the sentence enhancements involved in the cases of *Specht* or *Mullaney v. Wilbur*. Thus, the Court left open the question whether a defendant will have the right to a jury determination as to a fact relating to the circumstances of the offense that leads to a substantial sentence enhancement.

In *Spaziano*, the Court's decision that jury sentencing was not required at the Florida penalty stage was based on its conclusion that this sentencing proceeding "involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." 468 U.S. at 459. Although Florida's sentencing statute does require the sentencing judge to make findings on aggravating and mitigating circumstances, the petitioner in *Spaziano* did not challenge this aspect of the Florida sentencing procedure. Moreover, the death penalty before the Court in *Spaziano* could have been predicated on a

finding that pertained to the characteristics of the defendant rather than the circumstances of the offense.[9] Thus, the Court's holding that a capital defendant is not constitutionally entitled to jury sentencing seemed to be premised on the conclusion that capital sentencing essentially involves a "largely moral judgment of the defendant's desert," *Caldwell v. Mississippi*, 472 U.S. 320, 341 n.7 (1985), rather than a determination of facts that pertain to the circumstances of the offense.

D. The Jury Trial Right in the Present Case.

Applying the test to the *Walton* case indicates that the Arizona Supreme Court erred in rejecting petitioner's Sixth Amendment challenge. Under the Arizona statute, a capital defendant may not be sentenced to death unless at least one aggravating circumstance is found to exist. See

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[9] The first of the two aggravating circumstances found to exist in *Spaziano* – that the defendant had a prior felony conviction – related to the character of the offender rather than the circumstances of the offense. Based on the Court's decision in *Barclay v. Florida*, 462 U.S. 939 (1983), a Florida death penalty will be constitutional if the sentencer determines that at least one valid aggravating circumstance is present even though one of the other aggravating circumstances weighed against the mitigating circumstances is invalid. Therefore, in *Spaziano* it would be unnecessary to determine whether the second aggravating circumstance – relating to whether the crime was heinous or atrocious – was invalid because it was determined to exist by a judge rather than a jury; under *Barclay*, the death penalty could stand on the basis of the aggravating circumstance that related to the character of the offender and therefore, under the proposed test, could be found to exist by a judge.

Ariz. Rev. Stat. Ann. Sec. 13-703(E) (1978). The aggravating circumstances are specific, enumerated factual findings that define the act of capitally eligible murder, an act which, until the Legislature intervened in the 1970s, was always within the jury's province to find under Arizona law.[10] In Walton's case, the trial judge concluded that two aggravating circumstances were present: first, the defendant "committed the offense in an especially heinous, cruel, or depraved manner;" and, second, "he did so for pecuniary gain." Obviously, both of these aggravating circumstances pertain to the defendant's actions, and his mental state at the time he participated in the killing of the victim. Thus, the first prong of the proposed test is met, in that the facts to be determined relate to the circumstances of the offense.

The second prong of the test is also easily met. A finding that one of the aggravating circumstances exists enhances the defendant's potential sentence from twenty-five years to execution. In view of this Court's repeated statements that the sentence of death is qualitatively different from a sentence of any term of imprisonment, *see, e.g., Solem v. Helm*, 463 U.S. 277, 294 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975), it is scarcely necessary to argue that this increase constitutes a significantly enhanced sentence. A capital crime is immeasurably more serious than a non-capital crime.

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[10] From 1901 to 1973, Arizona law delegated to the jury all decisions on the nature and degree of an unlawful killing, including whether the crime was mitigated by excuse or justification, and whether a capital sentence was appropriate. *See Adamson v. Ricketts*, 865 F.2d 1011, 1024-25 (9th Cir. 1988).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court conclude that the Arizona death penalty statute violates the Sixth Amendment.

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